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The School Law Handbook

What Every Leader Needs to Know

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To my parents, Miriam and Cleveland, whose encouragement, support, and love are a constant for our family.
William C. Bosher Jr.

To my loving family, Michael, Jack, and Lauren, for all their support and inspiration.
Kate R. Kaminski

To my loving wife, Nancy; our children, Richard, Lynn, and John; and our 10 grandchildren for their support and encouragement. Their spirit helped to guide every stroke of the pen.
Richard S. Vacca

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Preface vii

Part I: The School Environment

1. School Safety 3
- Search and Seizure 3
- Crisis Management and Planning 10
- Relationship with Law Enforcement 16
- Random Drug and Alcohol Testing 23
- Zero Tolerance Policies 33

2. Commercialism in Schools 40

3. School Facilities 47
- Community Use 47
- Health Related Issues 55

Part II: Constitutional Issues

4. Religion in Public Schools 65
- Prayer 65
- Religion as Curriculum 78
- Holidays 86

5. Free Speech and Expression 95
- School Board Meetings 95
- Student Dress 104
- Student Publications 112

Part III: Students

6. Internet Use 121
7. Student Organizations/Clubs 127
8. Part-time Admission of Students 135
9. Student Medicine 144
10. Student Records 151

Part IV: Personnel

11. Personnel Evaluation 165
12. Governmental Immunity 179

Part V: Accountability

13. Educational Malpractice 189

References 198
Index 208
About the Authors 214

Preface

Recent school violence has created turbulent and uncharted waters for school leaders. The nightly news is peppered with scenes of students and teachers confronting shocking school and community crises.

Ten years ago, data driven management would not have been in the curriculum of a master's program in educational leadership. With high stakes testing for students and results-based accreditation for schools, teachers, principals, superintendents, and board members must understand how to use data to improve student performance. They must also be versatile in federal, state, and local laws and policies that govern their day-to-day work.

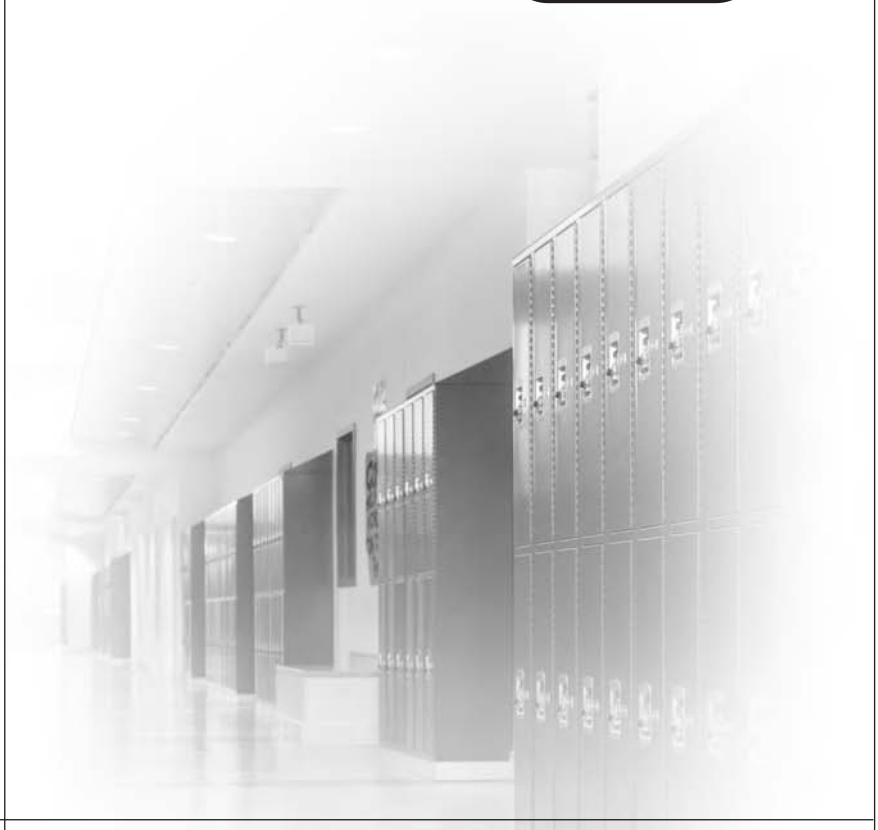
Issues like search and seizure have been around for a long time . . . but the rules have changed. New issues like zero tolerance have a variety of definitions, and perhaps more abuses, depending upon where you live and the values of your community. Sick buildings are unparalleled challenges that impact both staff and students. When and where do school leaders learn to deal with these ever-growing problems? They are seldom in the texts or the life experiences of those who are teaching the courses.

As an attorney, professor, and practitioner, Kate, Dick, and I (respectively) have attempted to develop a series of "real life" cases that have made their way into our schools. We have also

used our experience to look at the legal, policy, and practical considerations for each of the scenarios. School safety, commercialism, facilities, religion, student issues and admissions, board meetings, records, evaluation, immunity, and accountability became natural topics for this discussion. While school leaders—teachers, administrators, and board members—will always use their experience and collective thinking to make the best decisions for "their" schools, they must also be armed with information—laws, policies, and regulations—that will eventually be the basis for determining whether their decisions "stick."

William C. Bosher Jr.

Part I



The School Environment

Chapter 1

School Safety

Search and Seizure

Wayne Reynolds, the high school principal, sits in his office hoping to get through the last two weeks of school without another incident. This was the worst year ever for violence in his school. In fact, the school had closed the day before in response to a bomb threat. Parents, students, staff, and the community are understandably uncomfortable. Wayne thinks back to the good old days when school was about education, not security, but his reminiscing is abruptly interrupted by a call from Sergeant Murphy, the police officer assigned to the high school.

Sergeant Murphy blurts out, "Wayne, they arrested the two students who made the bomb threat yesterday. Johnny, a brother of one of the boys, is in the 9th grade and is on his way to school now. One of Johnny's friends just told me that Johnny was involved in the threat, too, but the police didn't arrest him because they'd already gotten his brother, the ringleader. Just to be safe, let's search Johnny's backpack, locker, and person before the first class." Wayne gulps his antacid and considers what to do.

Legal Considerations

The Fourth Amendment to the U.S. Constitution guarantees the right to be free from unreasonable searches. Made applicable to

the states by the Fourteenth Amendment, the Fourth Amendment also applies to searches of students in school by school officials (*New Jersey v. T.L.O.*, 1985).

New Jersey v. T.L.O.

In the case of *New Jersey v. T.L.O.,* a teacher discovered a student smoking in the bathroom, in violation of school rules. The student denied smoking, so the teacher took the student to the vice principal, who opened the student's purse. Inside, the vice principal found a pack of cigarettes and a package of rolling paper normally associated with marijuana use. The vice principal then searched the purse thoroughly and found marijuana, a pipe, plastic bags, a large sum of money, an index card with names of people who owed the student money, and two letters that implicated the student in drug dealing. Based on this evidence, the student was charged with a criminal drug violation, but she moved to suppress the evidence claiming that the search violated her Fourth Amendment right.

In response to the student's claim, the school board argued that the Fourth Amendment does not apply in schools because school officials act in the place of parents while children are at school. The Court, however, held that school officials act as the representative of government, not as parental surrogates, thereby affirming the Fourth Amendment's application to students in public schools. Even so, the Court ruled that the unique need to maintain a safe learning environment requires a lessening of the restrictions normally imposed for public officials to conduct searches. Therefore, school officials need not have probable cause to search students, only reasonable suspicion.

Reasonable suspicion exists if the search was justified at its inception and reasonably related in scope to the circumstances that justified the search initially. A search is justified at its inception if reasonable grounds exist to suspect that the search will reveal evidence that the student violated the law or school rules. A search is permissible in scope if the measures used are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age, gender, and the nature of the offense. Based on this standard, the Court held that

the searches conducted by the vice principal were constitutional.

New Jersey v. T.L.O. is an important case because it establishes the right of school officials to search students based on reasonable suspicion, not probable cause. Although the case also recognizes the student's right to privacy, the Court balanced that right against the school's need to provide a safe learning environment. Though the standard set by *New Jersey v. T.L.O.* remains the law today, the following cases, all decided since *New Jersey v. T.L.O.*, debate what constitutes reasonable suspicion.

- The presence of four students huddled together, one with money in his hand and another with his hand in his pocket, does not create reasonable suspicion (*A.S. v. State of Florida*, 1997).
- An anonymous phone call advising an administrator that a student will be bringing drugs to school, coupled with the student's reputation as a drug dealer, creates reasonable suspicion to search the student's pockets and book bag (*State of New Hampshire v. Drake*, 1995).
- A report made by two students to a school official that another student is in possession of a gun at school constitutes reasonable suspicion to search the student and his locker (*Commonwealth v. Carey*, 1990).
- An experienced drug counselor's observation of a student who appears distracted and has bloodshot eyes and dilated pupils justifies a physical assessment (considered a search) of the student's blood pressure and pulse (*Bridgman v. New Trier High School Dist.* No. 203, 1997).
- The fact that the search of all but one student in a class fails to reveal allegedly stolen property gives school officials reasonable suspicion to search the remaining student (*DesRoches v. Caprio,* 1998).
- The odor of marijuana in the hall outside the cafeteria does not provide reasonable suspicion to search all student backpacks, purses, and pockets (*Burnham v. West,* 1987).

Although the legal standard or test is clear, the application of the test to specific facts is not always so clear. The Court has even noted that "articulating precisely what reasonable suspicion means . . . is not possible. . . . Reasonable suspicion is a

commonsense, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act" (*Ornelas v. United States*, 1996).

Policy Considerations

Law Enforcement Assigned to Schools

Law enforcement officers assigned to schools (often called school resource officers or SROs) must have probable cause to search students in school, just as they would need outside of school. A problem arises, however, when school officials ask law enforcement to search students on behalf of the school administration or vice versa. Which standard applies to that search: reasonable suspicion or probable cause? Currently, little case law exists on this point, though some cases have attempted to address the issue, including the following examples:

- The mere presence of a law enforcement officer while a school official conducts a search does not trigger the need for probable cause (*Florida v. D.S.*, 1996).
- At least one court has held that police officers who perform searches at the request of a school administrator are subject to the lower, reasonable suspicion standard (*In the Interest of Angelia D.B.*, 1997).
- A Florida state appellate court applied the reasonable suspicion standard to a law enforcement search in school, stating that the lower standard applies because a school administrator initiated the investigation (*State of Florida v. N.G.B.*, 2002).
- At an off-campus location for an auto shop class, the school liaison officer from the city police department searched a student. The court applied the reasonable suspicion standard rather than the probable cause standard to this search even though the search was conducted by a police officer and took place off campus (*Shade v. City of Farmington*, 2002).
- Searches conducted by school officials acting as agents of the police because the police lack the higher standards of

probable cause are unconstitutional (*State of New Hampshire v. Heirtzler*, 2000).

One way for law enforcement to avoid the potential problem of making school officials their agents, and therefore subject to the higher standard of probable cause, is to have students, teachers, or others report information directly to school officials. This direct reporting removes the possibility of school officials becoming agents of law enforcement. However, school officials should not hesitate to have law enforcement present during a search or have them conduct the search in order to maintain safety and order.

Consent

Any time a school official or law enforcement officer lacks the necessary legal standard to search (reasonable suspicion or probable cause), he or she may ask the student for his or her consent to search. Consent, to be valid, must be voluntary. With this in mind, prior to asking for consent, the administrator or law enforcement officer should consider the student's age and mental capacity, and the context. If a student gives consent to search, the search must be conducted only as far as the student has consented. For example, if a student consents to a search of her locker, you may not search her purse without gaining additional consent (unless, of course, the search of the locker provides reasonable suspicion or probable cause).

Discipline or Conviction?

Even when a search is unconstitutional, the school administration may still use the fruit of the search as evidence in a disciplinary hearing, although it will be inadmissible in a criminal trial. However, if a school official knowingly and willfully conducts an illegal search, he or she may lose immunity from suit. All too often, school officials are confronted with decisions that pit the preservation of school safety against the individual's right to privacy. Increasingly, and in light of several recent school tragedies, courts are expanding the right of school officials and SROs to conduct searches at school in order to maintain a safe environment that is conducive to learning.

Practical Considerations

As the principal, Wayne has the responsibility to provide a safe environment for all students. Consequently, he must balance the rights of one student against those of hundreds of other students and faculty members who work in the building. As usual, Wayne does not have long to think about his response to a crisis; therefore, he must quickly prioritize his steps.

Wayne first must understand his school board's policy regarding student searches. If he has dealt with this sort of situation frequently, he should be well aware of his legal and procedural parameters. If he has not conducted a search or had related training, he should get in touch with the central office to seek advice from the contact for student discipline, or simply call another principal who has experience and respect. A seasoned principal's experiences and advice frequently provide the best crash course on a difficult issue. After obtaining advice, however, Wayne must realize that, ultimately, the decision is his; a school cannot be administered from a manual, the central office, or by a colleague. Wayne might also think through a mental or written checklist:

- Where is the student now and what will his/her schedule be when he/she arrives?
- Who in the building needs to be informed about this situation?
- Who will initially approach the student and bring him/her to the office?
- Where will the student be placed and who will supervise him/her?
- Who will call his/her parents?
- What will our response be if the parents do not want the student searched or try to check him/her out of school?
- Should the sequence of searches be (1) locker, (2) backpack, and (3) personal?
- What specifically am I looking for?
- Will a police officer be present when the searches are conducted?
- Do I have reasonable suspicion to search this student?
- Am I acting as an agent of the police or of the school?

- How far am I willing to go in conducting a personal search?
- What will I do if contraband is found?
- What administrative action is dictated by student codes of conduct?
- What legal action is required if potentially illegal items are found?
- How will I respond if there are questions from parents or the media?
- What intervention strategies are available to help this student and his/her family?

Although Wayne's personal checklist may include many other items, the key for any principal is to plan ahead. In this particular case, Wayne may want to search the locker before talking with the student. The findings at that stage will dictate the course of the conversation leading up to the backpack and personal search. The principal should always use his or her rapport with the student to try to get to the truth. If the student refuses to talk or denies any fault, then he or she may be requested to remove coats and other outer garments. A "pat down" may be deemed appropriate and, if this is the case, an observer should be present. Although he or she may not conduct the search without probable cause, a police officer is a great resource in these situations. If parents or the student object to the search, the principal has the right to conduct it with reasonable suspicion. He or she should avoid a strip search and turn the situation over to the police if there is fear of imminent harm. The principal should also distinguish between administrative and criminal action. Though the student's behavior may not rise to the level of criminality, it may certainly warrant suspension or a recommendation for expulsion.

Postscript

Given the legal standards and policy considerations, should Wayne search Johnny? Sergeant Murphy does not have probable cause to search Johnny. Does Wayne have reasonable suspicion to search him? The best approach in this instance would be for Wayne to talk directly to Johnny's friend, either by phone or in

person. If this information leads Wayne to believe that searching Johnny and/or his belongings will reveal evidence of the bomb threat, then Wayne has reasonable suspicion to conduct the search. In addition, Wayne or Sergeant Murphy could ask for consent to search Johnny. As always, it is entirely permissible for the SRO to be present during the search if Wayne feels there is a possible threat to life or limb. Once again, given the heightened interest in school safety, Wayne should err on the side of conducting a good faith search.

Crisis Management and Planning

The hurricane season is in full swing for Elk Ridge Elementary's area. Frequently there are no big storms at all, but occasionally a Fran or Bertha hits and causes millions of dollars in damage that reaches far beyond the coast. Though the summer has been mild and the Friday of the opening week of school seems ideal, there are warnings of late afternoon storms and potentially heavy rain due to the hurricane currently swirling well south of the school, which houses grades K–5—a total of more than 500 students.

Debbie Olson, Elk Ridge's principal, is supervising the cafeteria when Vera Samson, the school secretary, brings her a note indicating that she has heard on the radio that the hurricane is turning in their direction. Debbie returns to her office and makes a call to the district administrative building to see if they've received any current information on the weather. The public information officer indicates that they are in touch with public safety personnel and will let her know if there is any other news.

Debbie periodically monitors the weather channel while working with the normal flow of students, parents, and teachers. Around 2:15 p.m., with the 3 p.m. closing bell approaching, some of the buses start to roll in. At 2:20 p.m. Debbie receives a call from the central office public information officer informing her that the National Weather Service has released a bulletin calling for a severe weather watch in their area. Included in the bulletin is a warning for heavy rains, high wind, and potential tornadoes

touching down between 2:45 p.m. and 4:15 p.m. As soon as Debbie hangs up the phone, she steps out of her office to greet parents who are coming to get their children. Some have already heard the news and are spreading it quickly to others. Bus drivers are gathering near the front loop; several of them comment that they will not drive in such conditions. Meanwhile, teachers passing through the front office begin to get the news, and word travels quickly through the building.

It is 2:45 p.m. and Debbie has storms on at least two fronts: outside and inside the building. Should she hold the buses? What should she do with the students? What should she tell parents? What must be done to ensure the safety of both students and adults? What is the plan that must be implemented in the next 15 minutes?

Background Discussion: Schools and Crisis

The Columbine school shootings and the numerous other tragedies that have plagued schools in recent years have generated an avalanche of material, policies, training, and equipment designed to make schools more secure and safe. Although the outcome may differ, the planning required for handling these events varies little from what is necessary following a breakout of a potentially deadly disease, a fire in or around the school, a hostage incident, a gas leak, an escaped prisoner from the local detention center, an explosion in the chemistry lab, an estranged parent taking a child from school, or a bank robbery taking place down the street.

Crisis management and planning in school must be a constant process and priority, even with the knowledge that the steps designed will be applied to an as-yet-unknown event or circumstance. This is not a new phenomenon for schools. The grandparents of today's students remember the drills taught during and after World War II. Civil defense systems were in place to warn school administrators of potential attacks, and students were taught to line up, move quickly to designated areas, and assume safe positions. Today, schools are typically required to administer bus evacuation drills. Where weather is a

factor, hurricane or tornado exercises are practiced on a routine basis. In one area, flash flooding may be a potential problem, and in another, the threat of an avalanche may loom; whatever the crisis, the common thread is the need to plan ahead and to be fully aware of how a response plan will be executed if the need arises.

Legal Considerations

Students who attend public school typically are not there because it is a legal privilege, but rather because it is a requirement. States, through compulsory attendance laws, require young people to be in school. This requirement creates an added degree of responsibility for students' safety and welfare. Although "in loco parentis," at least in the courts, has become a less readily accepted concept, schools' liability for prudent preparation and action has only grown. A case of meningitis or tuberculosis must be confronted with a swift response that includes health officials, the media, and any community organizations where there may have been contact with the involved students, as well as messages to school patrons that are both specific and protective of the rights of those students. On a more common note, a fight in the cafeteria at a middle school can escalate into a real crisis. What is the principal's legal responsibility to control the potential variables in a crisis within the building, on the campus, and possibly even within the community?

Federal Law

The Environmental Protection Agency, Occupational Safety and Health Agency, Communicable Disease Center, and Federal Emergency Management Agency are all examples of federal agencies that may respond to a crisis. These specific-purpose departments also assist the work of federal, state, and local law enforcement agencies. In the reauthorization of the Elementary and Secondary Education Act and related federal legislation specific to schools, the Safe and Drug Free Schools provision (20 U.S.C.S. §7114, 2002) requires funding for a "'crisis management'

plan for responding to violent and traumatic incidents on school grounds." A center shall compile information about the "best practices in school violence, intervention, and crisis management, and shall serve as a clearinghouse for model school safety program information" (20 U.S.C.S. §7138, 2002).

State Law

State codes, regulations, and policies contain an ever-increasing number of provisions for crisis management and planning. For example, in California (Cal. Ed. Code §32239.5), the code related to the "school violence and response task force" calls for membership consisting of people with expertise in crisis management. In Florida (Fla. Stat. Ch. 229.8347, 2001), the code outlines strategies to maintain schools that are safe and secure, including faster coordination among schools through the use of law enforcement personnel and "crisis management teams." In Illinois (20 ILCS 4027/25), the Safe to Learn Program requires a component in crisis management.

In Virginia (Va. Code 22.1-279.8), the code dictates that each local school board shall require every school it supervises to have a written school and emergency management plan. The law defines the plan as "the essential procedures, operations, and assignments required to prevent, manage, and respond to a critical event or emergency, including natural disasters involving fire, flood, tornadoes, or other severe weather; loss or disruption of power, water, communications, or shelter; bus or other accidents; medical emergencies; student or staff member deaths; explosions; bomb threats; gun, knife, or other weapons threats; spills or exposures to hazardous substances; the presence of unauthorized persons or trespassers; the loss, disappearance, or kidnapping of a student; hostage situations; violence on school property or at school activities; and other incidents posing a serious threat of harm to students, personnel, or facilities."

Policy Considerations

Planning, preparation, and practice are the three major components of crisis management. Realizing that the specific event to

be confronted is unknown, the planning must be flexible enough to adapt to many different conditions, yet specific enough to provide direction for all who may be involved. Preparation includes the identification and acquisition, if necessary, of resources, both human and material, that will be essential in dealing with the emergency. Practice is the training and internalization of the plan that is critical for eliminating the "panic factor" and carrying out the plan as designed. The emotion brought on by a crisis is obvious and understandable; however, a well-conceived, rehearsed, and implemented plan brings order to a potentially chaotic situation. The following is a checklist of questions to consider when forming a crisis management plan:

- Does your district have a prototype crisis management plan?
- Do you have guidelines for crisis planning?
- Do you have easily accessible manuals that provide important phone numbers and clearly defined steps to take?
- Does your school board have policies related to crisis management and planning?
- Do you have maps of the building and grounds and do staff members know their individual responsibilities in the event of a crisis?
- How do you communicate a crisis to the staff?
- Who is to be notified when there is an emergency?
- What are the state and federal guidelines related to crisis management?
- Do you have different requirements based upon the nature of the crisis?
- What community agencies are critical partners in any crisis?
- Do you address crisis management in teacher and student handbooks?
- Do you know when to refer or defer to someone else?
- What are your sources of information and advice before, during, and following a crisis?

Practical Considerations

As the principal, you are much like the ringmaster in the middle of a circus. Your strength lies not in trying to be all of the acts, but rather in knowing exactly what acts are under your "tent." Even though emotions may run high—fear, apprehension, loss—the crisis management plan provides the security that is necessary to minimize panic and enhance safety. Commit as much of the plan as possible to memory, but also write down the steps to be taken and contact numbers on an index card and put it in your pocket or purse. Every pilot uses a written checklist to preflight the plane, no matter how many times a day he or she may fly. Pilots also acknowledge that most of the errors in flying are made on the ground, before the plane ever gets into the air, so prepare and use your checklist and be faithful to your plan to avoid errors.

In reality, Debbie Olsen's first decision is to determine where students and staff will be safer, on the road or at school. She will likely want to make this decision in consultation with a designated staff member at the central office; however, if there is no such designated staff member or the conditions do not permit this contact, then she must make the decision alone. She cannot stop parents from taking their children out of school, but she can ask them to stay in the building until the crisis has passed. It is also critical to quickly get to the bus drivers, who can act as additional resources to work with parents and students, or, if left out of the loop, can be a conduit of misinformation to those coming in and out of the building. Debbie needs to have key staff members carry the best, most up-to-date information that she has to others and provide periodic updates as conditions change. A clear and honest one-minute briefing disseminated through key people or the intercom can save hours of rumors and rancor.

Debbie may also want to enlist some of the arriving parents to help teachers and staff comfort and support students. Everyone should be moved to those areas in the building that have been designated as safest in the event of a tornado or hurricane. If possible, items that could potentially become flying objects should be secured and glass should be avoided. Via a previously

designated news outlet (usually a radio station), parents should be notified if the decision has been made to keep students at school beyond the normal hours. When the storm has passed, Debbie should contact the police or fire department to determine if it is safe to release students and the buses. The conditions in the community may dictate that students stay at the school for a much longer period of time. In cases where the school literally turns into a shelter, the plan must also reflect coordination with community emergency groups that focus on public safety, shelter, and aid.

Postscript

Debbie's first and primary objective is safety. Parents and bus drivers may offer a variety of opinions about what to do, but the principal must focus on two areas: if parents want to sign out their children, then she should permit it, and the decision that she makes is for the school, not an individual. In her 15 minutes, she should try to get in touch with the police department to get a firm recommendation regarding traffic and highway safety. This call alone may provide a decision. She should also notify staff and teachers to take young people and other adults in the building to places designated as safe during storms. If all of her sources, including the central office, have not provided adequate information to make a decision, Debbie should act prudently by holding everyone and letting the buses be late. A concrete building is a much lower risk than rolling buses in difficult traffic. Remember, you don't make a "bomb threat" decision by committee.

Relationship with Law Enforcement

It is Saturday and Al Shelton, the principal of Apple Valley High School, hears his phone ring shortly before midnight. The call is from the deputy chief of police, who informs the principal that two of his students have been shot and killed at a party in a nearby community. A 15-year-old sophomore girl and a

17-year-old junior boy were hit by bullets randomly fired from an AK-47 by a student from a neighboring school district who was upset that he had not been admitted to their party.

The parents who live in the home stated that they were having a birthday party when a carload of students arrived and were turned away. Students at the party indicated that there were about 200 attendees and that each person had been asked to pay a $2 cover charge. When the new arrivals were turned away for refusing to pay the fee, one of them—a 16-year-old boy—went back to the car, pulled out an AK-47, and sprayed the house with bullets. The boy and his companions then jumped into the car, later determined to be stolen, and fled the scene. Approximately one hour later, police found the car and arrested the boys. When the 16-year-old was asked why he had fired into the house, his only response was, "It's my gun, and I'll do what I want with it."

While the community mourns and tries to overcome its shock, Al Shelton and his staff spend Sunday afternoon and evening preparing for school to open on Monday morning. With counselors, social workers, and psychologists manning tables in the library and cafeteria, hundreds of students start arriving in search of answers as to why two of their classmates lost their lives in such a senseless manner. Even though the party was not a school-related activity, its tragedy has come to the front halls of Apple Valley High.

Background Discussion: Schools and Law Enforcement

The development of a strong relationship between schools and law enforcement agencies does not begin with a midnight call from the local precinct. Police have always been in and around schools—supervising at ball games, speaking to students, and dealing with crises. A new breed of policemen and women—the school resource officers (SROs) mentioned earlier in this chapter—continues to shape this relationship. Some schools hire guards or security personnel and others have their own "police force," but most schools in America rely on the strong communications and trust established with their local police or sheriff's department.

Customary discussions between police and schools have included the issues of search and seizure, visibility on school grounds, communication of student arrests and charges, handling of potential evidence, response time to critical incidents, and reasonable suspicion/probable cause. This dialog must now also include community policing, shared responsibility on campus, prevention, "intelligence gathering," joint community responses, and collaborative policies such as zero tolerance-based initiatives. Police leaders now understand that large numbers of their citizens are housed daily in one kind of institution: schools. In turn, educational leaders, having recognized the value of the training police have in prevention techniques, are looking more and more to the police as a resource.

With these more complex components and responsibilities, law enforcement agencies and schools must also begin to develop written "memoranda of understanding." These statements of roles and responsibilities can highlight the obvious, such as laws and regulations, as well as the typically gray areas associated with administrative style and interpretation. Clearly delineated responsibilities and an open communication system permit law enforcement personnel and school administrators to focus jointly on problems rather than getting hung up on procedures.

Legal Considerations

Federal and State Laws

Depending on the nature of the allegation, a variety of federal agencies that have law enforcement units could be engaged with a school. The U.S. Department of Justice, for example, has broad police powers and has provided leadership for numerous prevention and intervention programs. The Department of Justice's Community Operated Policing Services (COPS) has developed grants for police agencies and organizations, awarding $5 million in 2002 to 69 agencies in 27 states to increase school safety. This "Secure Our Schools" funding has provided for metal detectors, locks, lighting, and other supportive technologies. COPS also awarded $670 million to hire 5,900 SROs. In 2002, COPS Director

Carl R. Reed stated in the release of funds, "Creating the safest schools possible is a priority shared by the law enforcement community, educators, and the public."

A graphics student who creates bogus $20 bills as a class project may bring a visit from the Treasury Department, but any number of government agencies, from the U.S. Customs Service and U.S. Postal Inspectors Service to the FBI, ATF, or Secret Service, may be involved with schools as well. In the fall of 2002, two snipers in the Washington, D.C., area took the lives of several people and threatened that "children [were] not safe." Local, state, and federal agencies in Virginia, D.C., and Maryland worked together to catch the suspects. They also held briefings for school superintendents regarding the progress of the case and provided information that might influence their decisions. School divisions in the Richmond, Virginia, metropolitan area, for example, were closed on a Monday following a Sunday afternoon briefing with state and local police.

The decisions of school administrators, however, were not made simply because of a public safety directive, but rather because of honest, open communication predicated by long-standing relationships and structured plans developed prior to the crisis. A testimony to the value of agreements between police and educational leaders followed this tragedy when Penny Berg-Nye, a principal in Charles County, wrote to the *Washington Post* thanking the state and local police of Maryland on behalf of all of the principals of Charles County Public Schools.

State initiatives have raised the importance of school/police partnerships by placing language specifically addressing those partnerships into codes and regulations. California is a particularly good example of this trend. There, the Department of Education and the attorney general's office created the School Community Policing Partnership Program. Further, in 2002, as established by Education Code Section 32296.3, the state awarded $10 million in grants to school districts that demonstrated collaboration among schools, police, and community patrons. Each grant included a provision for a "letter of agreement" signed by each of the involved parties. Also in California, the California Safe Schools Assessment compiled data about

drug and alcohol offenses, crimes against persons, possession of weapons, and property crime. California, however, is by no means the only state with such initiatives. In New York, the state police, governor, and legislature worked to establish a network of school/community outreach coordinators whose primary purpose was to raise the level of communication between key stakeholders. Such initiatives demonstrate the importance currently being placed on joint planning and the sharing of information as critical components of crisis prevention.

Policy Considerations

The responsibilities of law enforcement officers assigned to schools are reviewed earlier in this chapter. However, the larger operational context for school/police relations is forged through public policy and the aforementioned memoranda of understanding. Perhaps the greatest challenge to a strong working relationship between law enforcement and school administrators is the failure to understand who is responsible for what. In Pinellas, Florida, for example, a conflict arose from a disagreement between a principal and an SRO over an incident involving a teacher. The principal considered the issue administrative, whereas the SRO perceived it as criminal. The principal faced obstruction of justice charges until the state attorney general decided that he should not be charged. The *St. Petersburg Times* reported on June 27, 2001, that, as a result of this challenge, a committee of "lawyers, principals, educators, and law enforcement officers" had been charged with writing a "memorandum of understanding." The article also included a comment from a sergeant in the Pinellas County sheriff's office regarding the situation: "You have two professions that have to come to terms with each one's responsibility." The director of operations for the school district also noted, "The principal really has no direct authority over the SRO, but it needs to be a collaborative relationship."

Although the wording of a memorandum of understanding may be broad and encompassing, the results are likely to be very specific. In Alexandria, Virginia, for example, police and school

officials were concerned about school bus safety, particularly the operation of vehicles around buses. In an attempt to address this concern, the superintendent of schools and the chief of police drafted a joint letter to go out to the community containing tips for motorists. Following the shooting in Littleton, many communities joined together, as in Hamilton, Ohio, to share "what-if" scenarios and to come up with possible policy changes to address them. The *Rocky Mountain News* (January 1, 2003) reported that because of the Columbine incident, the legislature would close a loophole in Colorado law by introducing a measure that would permit police to share information with school officials.

Policy concerns of this nature are so pervasive that our neighboring countries have also addressed the issue. In 2000, the Canadian Hastings and Prince Edward District School Board added a policy on police involvement stating that "the Board recognizes its responsibilities to the students enrolled in its schools and the lawful authorities." Clearly, state and local policies are starting to reflect the need for school officials and police departments to strengthen the ways they work together.

Practical Considerations

Unfortunately, schools cannot be protected from the potential of criminal activity; consequently, there must be systems in place that serve to detect the activity when it occurs and complement rather than compromise any resulting investigation and prosecution. At the same time, however, principals, teachers, and superintendents are responsible for protecting the rights of their students. If not approached carefully, these dual responsibilities can potentially create conflict. In order to avoid such discord, the leadership of the school and the police department should work to determine who is responsible for what prior to facing a critical incident. The following questions may help administrators and law enforcement officers make these determinations.

- Does the school district have a memorandum of understanding with the police department?
- Are the legal responsibilities of law enforcement and school personnel clearly defined?

• If law enforcement officers are assigned to the building, what is their role in non-criminal areas such as discipline?

• Has the district developed standard operating procedures for dealing with potentially criminal activity?

• Has training been provided for school personnel?

• Has training been provided for police personnel?

• Has a communications system been established with the courts?

• Have judges and police been invited to the school to speak to students about criminal behavior and its consequences?

• Have police and school personnel met with community groups to discuss their joint efforts?

• Has the school board or board of education put into policy their intent regarding school/police cooperation?

• Do state laws and local ordinances permit schools and police to share information?

• Does the school have a code of conduct that has been reviewed by the police department?

• Does the school consistently refer to the police all incidents that may be illegal?

• Does the police department consistently refer to the school district any administrative issues that may be detected in their investigations?

• Do school and police officials meet regularly to review and analyze data that may be of common interest, such as juvenile arrest statistics, truancy, dropouts, weapon possession, drug and alcohol use, and assaults?

Postscript

Even though the incident that Al Shelton, his students, and his staff members are dealing with did not occur in the building or on school grounds, it is still something that they must confront. Because Al has a good working relationship with the police department, he was notified immediately about the tragedy, giving him time to plan for the emotional and psychological distress that would come to school on Monday. He was correct in pulling his team together on Sunday afternoon to form such a plan, and

he accurately anticipated the need for counselors, psychologists, social workers, and professionals from the community who could provide students and staff with a sympathetic ear and words of encouragement. Al's job is hardly over, however. He also will need to assist the police with information that might help them to determine the "who and why" of the crime.

Relationships of the kind Al shares with the police department and his staff members are rarely forged in the middle of the night when a terrible, unexpected incident occurs. Al and his colleagues planned well. And even though their preparation could not offset a tragic loss, it proved critical for those left to deal with the incident's aftermath.

Random Drug and Alcohol Testing

Asheville is a small, rural county with about 1,000 public school students. About a year ago, the chair of the school board became concerned about drug use among the local high school's students and young teachers. The chair's concern was based on a sudden rise in alcohol- and drug-related disciplinary offenses and the local sheriff's report that a new designer drug had hit the county and was very popular among teenagers and young adults. Also, the chair's daughter reported to him that several of her friends had begun experimenting with drugs.

Based on this information, the school board passed a random, "suspicionless" alcohol and drug testing policy that went into effect for the current academic year. The policy requires random alcohol and drug testing of all high school students—though not middle school students—and all candidates for employment. All was going smoothly, and the community seemed to support the policy, until Lawrence Hegel, the high school principal, randomly selected Mary Wharton, a 10th grade student, and Karen Jordan, a potential drama teacher, for the test.

As dictated by policy, Mary and Karen were called to the school nurse's office where they were asked to provide a urine sample. The nurse explained that she would wait outside the

door and listen for the sound of urine, but that she would not be present in the bathroom stall with Mary or Karen. The nurse further explained that the urine would be sent to a lab to test for illicit substances only. Additionally, in accordance with school policy, the nurse gave Mary and Karen the opportunity to confidentially disclose any prescription or non-prescription medication they might be taking that could affect the results of the test. Mary refused to urinate in the cup and was consequently suspended for five days. Karen took the test, but later talked to the local education association about suppressing its results.

During the suspension, Mary's parents filed suit against the school board for violation of their daughter's Fourth Amendment right to be free from unreasonable searches. The school board attorney, Derrick Bayliss, advised the board chair to settle the case. Derrick had informed the school board a year ago when the policy was first drafted, and tells the members again at an emergency meeting to discuss the Mary Wharton case, that the policy is flawed and will not pass constitutional muster. Derrick, unsolicited, advises the board to "tell the employee that the test results will be trashed." Is the school board policy constitutional?

Background Discussion: Student Alcohol and Drug Testing

The type of testing at issue in this section is random or "suspicionless" testing of students via a urine sample for alcohol and/or illicit drugs. Testing urine for drugs or alcohol is considered a search under the Fourth Amendment. This type of search is highly controversial because it involves a bodily fluid, is legally complex, and does not involve individualized suspicion of wrongdoing, something usually required for a search to be deemed reasonable under the Fourth Amendment. However, just because the search is suspicionless does not mean it is unjustified; exceptions are warranted when special needs exist, beyond the normal need for law enforcement.

Legal and Policy Considerations

Federal Law

In 1985, the law recognized that school children have lower expectations of privacy than adults because of the need to protect and educate them, and because they are already subject to routine health screenings such as immunizations and scoliosis checks.

The Fourth and Fourteenth Amendments to the U.S. Constitution provide students the right to be free from unreasonable searches and seizures. However, as discussed in the "Search and Seizure" section, the standard for searches of students in schools is "reasonableness." The *T.L.O.* case held that the unique need to maintain a safe learning environment requires a lessening of the restrictions normally imposed for public officials to conduct searches. Therefore, school officials can search students based on reasonable suspicion. This analysis also applies to individual students suspected of being under the influence of alcohol or drugs.

Until 1995, the U.S. Supreme Court had not addressed suspicionless drug testing in schools. That year, the Court gave schools the ability to randomly drug test student athletes based primarily on the fact that the school policy "was undertaken in furtherance of the government's responsibility, under a public school system, as guardian and tutor of children entrusted to its care" (*Vernonia School Dist. 47J v. Acton,* 1995). The Court did not authorize all school drug testing, but rather embarked upon a fact-specific analysis of the intrusion upon the student's Fourth Amendment right and the promotion of a legitimate government interest. The Court held that the Vernonia school district drug testing policy was constitutional because the invasion of the student's privacy was minimal compared with the compelling government interest to protect students by deterring drug use. This determination was based on the following facts:

- The students were participating in a voluntary, optional activity, that is, sports.
- Student athletes' activities are already highly regulated.

• Student athletes had lower expectations of privacy because they dressed and showered communally.

• Athletes performing under the influence of drugs would pose an increased risk of injury.

• The student athletes were role models for the other students and known drug ringleaders.

• The testing procedures were minimally intrusive and fair.

• The test detected only specific illicit drugs rather than unrelated medical facts, such as pregnancy.

• The policy provided a confidential process for disclosing the use of prescription drugs or other medication that might affect test results.

• The consequences of the test were not punitive, but rather rehabilitative. Law enforcement was not notified of positive results and no school discipline was imposed.

Based on these specific facts, school districts across the country began to implement drug testing for athletes. However, some districts attempted to extend *Vernonia* to other extracurricular activities as well.

Until 2002, the courts were split over suspicionless drug testing of students other than athletes. That year, the Supreme Court expanded the right of school boards to drug test not only student athletes, but also all students participating in extracurricular activities. The decision clarified some of the Court's earlier *Vernonia* rulings by stating that a history of a serious drug problem or epidemic, and communal undress are not essential for a constitutional suspicionless drug testing program. Rather, the most important factor in determining whether a blanket drug testing program is legal is the "schools' custodial and tutelary responsibility for children" (*Board of Education of Independent School Dist. No. 92 of Pottawatomie City v. Earls*, 2002).

The Court held that "testing students who participate in extracurricular activities is a reasonably effective means of addressing the school district's legitimate concerns in preventing, deterring and detecting drug use." The local school policy required students to take drug tests before participating in extracurricular activities and to submit to random drug testing while participating in that activity. As a matter of practice, the

policy was only applied to students in competitive extracurricular activities. The Court deemed the policy constitutional, asserting that the most important part of the case, as in *Vernonia*, was that the "policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. . . ." The Court went on to state, "When the government acts as guardian and tutor, the relevant question is whether the search is one that a reasonable guardian and tutor might undertake" (*Board of Education of Independent School Dist. No. 92 of Pottawatomie City v. Earls*, 2002, p. 6). Further, the policy met many of the conditions already established in *Vernonia*, including:

- The test detects only the use of illegal drugs, not medical conditions or authorized prescription medication.
- The student's privacy interest is diminished by virtue of being in a public school context where the state is responsible for maintaining student discipline, health, and safety.
- The privacy interest is diminished because students are regularly subject to physical exams and immunizations.
- Participation in communal undress or athletic physicals was not essential to the *Vernonia* holding.
- All of the extracurricular clubs have their own regulations regarding membership that do not apply to the whole student body.
- The collection of the urine sample is minimally intrusive because the monitor waits outside the stall door and listens for the sounds of urination.
- Test results are confidential and kept separate from other educational records. Such results are released only on a need-to-know basis.
- The test results are not disclosed to law enforcement.
- Positive results do not result in disciplinary or academic consequences. The only consequence is the denial of the privilege to participate in the extracurricular activity.
- A demonstrated history of drug abuse is not necessary to validate a drug testing regime. However, some documented history of a drug problem does shore up an assertion of "special needs" for a suspicionless general search policy.

• The role model effect mentioned in *Vernonia* is not essential to the constitutionality of the policy.

The Court concluded that the students who are subject to the testing have a diminished expectation of privacy. Second, the Court noted that the test is minimally intrusive, and its results are used on a limited basis, making the invasion of privacy insignificant. Third, the Court held that the government interest in the need to prevent and deter drug use provides the special needs necessary for the testing policy. "It would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." Although safety does factor into the "special needs" analysis, the safety interest promoted by drug testing is "undoubtedly substantial for all children, athletes and non-athletes alike."

It is fairly clear that school boards may adopt policies requiring suspicionless or random drug testing of students who participate in extracurricular activities and sports, if done according to the standards set forth by the *Vernonia* and *Earls* rulings. What remains unclear is how far suspicionless drug testing of students can be expanded. Can schools test all students? Can schools test students who drive or park on school property? Can schools test students involved in certain disciplinary infractions? The following pre-*Earls* federal cases address some of these questions:

• *Willis v. Anderson* (1998). A policy requiring students suspended for more than three days to be drug tested was invalidated. The court held that the lack of individualized suspicion created the constitutional flaw in the policy. No special needs existed to warrant a search of such students and they were not participating in a voluntary activity. Further, there was no evidence of a nexus between drug or alcohol abuse and these disciplinary problems. The court also noted that this category of students had a greater expectation of privacy than athletes or those participating in other extracurricular activities.

• *Tannahill v. Lockney Independent School District* (2001). A school policy to test all students attending school was deemed unconstitutional. The court held that "general concerns about

maintaining drug-free schools or desires to detect illegal conduct are insufficient" to justify such a policy.

State Law

Some suspicionless drug testing policies have been challenged under state constitutional provisions:

• *Odenheim v. Carlstadt-East Rutherford Regional School District* (1985). A comprehensive medical examination policy included "drug screening for detection of the presence of controlled dangerous substances." The state court struck down this policy because it violated the state and federal constitutions. The court held that the policy was "not reasonably related in scope to the circumstances which initially justified the interference." The "medical test" had punitive consequences (exclusion from class) without affording due process. Therefore, the policy violated both the due process clause and the state and federal right to be free from unreasonable searches.

• *Joye v. Hunterdon Central Regional High School Board of Education* (2002). The school passed a policy requiring students involved in extracurricular activities and students permitted to park on campus to submit to drug testing. A student sued, based on the policy's violation of the New Jersey state constitution. After the *Earls* decision, all parties agreed that there was no violation of federal law. The policy also passed state constitutional muster. The New Jersey Superior Court noted that the lower court erred in determining that the state constitution gives greater protection than the U.S. Constitution: "Unless the state court can show from an examination of the textual language of the two constitutional provisions, the legislative history of the state constitution or the state's tradition that the matter is of particular state interest or concern, it should not expand federal constitutional rights under an identical state constitutional provision." The court also opined that requiring a school's drug problem to exceed the national norm and requiring the targeted students to use drugs more than the general population before a policy can be considered legal is "bad law, bad policy and impractical." The court concluded that even if the search were not consensual, the policy meets the special needs test because

the goal of deterring drug use outweighs the minimal intrusion of a confidential urine analysis.

Employee Drug and Alcohol Testing

Like students, adults who are applying for employment in, or who are already employed by, a school may be subject to random, blanket, or suspicionless drug and alcohol testing.

The Fourth Amendment protects school employees' rights but, as with students, these rights can be abridged in the employment context based on special needs. Though they did not specifically deal with school employees, three Supreme Court decisions set the standard for such drug testing:

• *Skinner v. Railway Labor Executives' Assn.* (1989). The Supreme Court upheld drug testing of railroad employees because of the high level of attention necessary for the job and the great potential for harm. The Court noted that there are exceptions to the individualized suspicion of wrongdoing requirement when special needs, beyond the normal need for law enforcement, exist. "[I]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."

• *National Treasury Employees Union v. VonRaab* (1989). The Court upheld a drug testing program for customs agents, as they are armed and drug interdiction is one of their duties.

• *Chandler v. Miller* (1997). The Court struck down a state law requiring candidates for public office to certify that they had tested negative for drug use. The Court determined that there was no documented drug problem among public officials and no compelling interest to test that particular group because safety was not genuinely jeopardized. Promoting an anti-drug image or setting a good example is not a sufficient need to justify suspicionless drug testing. "When such special needs . . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context specific inquiry, examining closely the competing private and public interests advanced by the parties."

Cases specific to school employees are split on the constitutionality of drug testing programs:

• *Knox County Education Association v. Knox County Board of Education* (1998). The school board adopted a policy requiring suspicionless drug testing for all individuals applying for or seeking transfer or promotion to safety-sensitive positions. According to the policy, teaching and administrative positions were designated as safety sensitive. No evidence existed of a drug problem among the staff. The court balanced the school board's interest in testing against the teacher's privacy interest and upheld the policy because teachers are on the front line of school safety and security. The court also found that the teacher's privacy interests were diminished by working in a highly regulated industry and by the nature of the job.

• *United Teachers of New Orleans v. Orleans Parish School Board* (1998). A school board policy required drug testing of teachers and other employees injured in the course of employment. The court invalidated the policy because the school could not demonstrate a sufficient link between suffering an injury and drug use.

• *Aubrey v. School Board of LaFayette Parish et al.* (1998). Under a policy designed to eliminate drug use from the workplace, a janitor was selected as a safety-sensitive employee for drug testing. According to the school board, its program was "designed to prevent drug users from obtaining a safety sensitive position and to aid in detecting those employees in such positions who use drugs so that they may undergo treatment as a prerequisite to keeping their jobs." The court held that, as part of its role as guardian, the school must protect children from themselves and from adults who may cause harm, creating the special need required to make the policy constitutional.

For some school employment positions, drug testing is required by federal statute. According to 49 U.S.C. § 2717, the Omnibus Transportation Employee Testing Act of 1991, bus drivers and other employees required to hold a commercial driver's license are subject to pre-employment, random, post-accident, and reasonable suspicion drug testing.

Practical Considerations

"Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing school children. In upholding the constitutionality of the policy, we express no opinion as to its wisdom" (*Board of Education of Independent School Dist. No. 92 of Pottawatomie City v. Earls*, 2002). The need for—or in the parlance of the court, the wisdom of—implementing a drug testing policy for employees and/or students should be a primary consideration. If such a need does exist, consider the following:

- Who will be tested? What is their risk of harm? What is their privacy expectation? What is the intent of the policy: punitive or rehabilitative?
- Who will have access to the test results and how will the results be used and stored? Minimize the invasiveness of the privacy intrusion.
- Have parents and the community participated in identifying the need for a drug testing program and, if so, have they helped design the program?
- Require that parents and students sign the drug testing policy at the beginning of each school year.
- Train employees.
- Allow for confidential disclosure of prescription and nonprescription medicine that could affect test results.
- Design a neutral process for random selection of subject students or test all subject students.
- Discuss the need for testing with the community, lawenforcement, mental health professionals, and physicians.
- Analyze the cost of instituting such a program.
- Determine whether the employees to be tested hold safetysensitive positions.

Postscript

Understandably, the school board attorney is concerned about the legality of Asheville's policy. Although the Supreme Court has given much-needed guidance of late, the legal boundaries of

suspicionless drug testing are still emerging, and the Asheville school board has extended its drug testing policy beyond any established parameters. However, just because the policy is untested does not mean it is unconstitutional. Rather, the school board, its attorney, and the superintendent must ensure that the policy satisfies the legal standards set forth in the federal case law discussed above.

With regard to both employees and students, the board must demonstrate special needs that justify the privacy invasion. In terms of the policy's application specifically to students, the board must consider that the students subjected to testing in this case are not engaging in a voluntary activity, but rather compulsory school attendance. Further, any disciplinary or punitive consequences of the test results, as opposed to a counseling/rehabilitative approach, pose a potential problem. Regarding employees, the facts of the case are very similar to *Knox*. Therefore, it may be unnecessary to disregard Karen's test results. The school board must balance the financial burden of any potential litigation with the long-term benefits of implementing the policy.

Zero Tolerance Policies

The year was off to an amazing start. The first six-week period of school had ended without a single drug- or weapon-related disciplinary infraction. This time last year, there had already been 10 expulsions or suspensions for these types of offenses. The superintendent shouts to his secretary, "Those zero tolerance policies the board adopted last year have made a real difference; I haven't had to expel or suspend anyone for drugs or weapons all year!"

His secretary wisely replies, "Don't count your chickens before they're hatched."

On the school bus the next day, LaMar Jackson, an 8th grade honor student, discovers that his best friend, Donna Perry, wants to commit suicide. In fact, Donna has a gun in her backpack. LaMar is able to talk Donna out of her plan to commit suicide and takes the gun away. They arrive at school and LaMar

puts his backpack, with the gun inside, in his locker. Word of the incident gets out, and LaMar is regarded as a hero for taking the gun away from his suicidal friend. The principal, however, doesn't share that opinion and immediately suspends LaMar. Further, in accordance with school board policy, he recommends LaMar's expulsion to the superintendent. Donna is also suspended and is recommended for expulsion for bringing the gun on the bus. When the superintendent finds out about the incident, he scratches his head and says to his secretary, "There goes my clean discipline record. How can I suspend LaMar for saving someone's life?"

The superintendent, troubled by this seeming injustice, calls the school board attorney. "How do I suspend LaMar?" he asks. "He did the right thing. I only wish he had taken it directly to the school counselor. He said he didn't want to embarrass Donna or get her in trouble."

Background Discussion: Definition, Effectiveness, and Student Rights

School safety is a critical issue. Without safe schools, learning and teaching cannot occur effectively. Horrific incidents in Littleton, Jonesboro, Springfield, West Paducah, and Pearl have brought the threat to school safety into the public consciousness. In response to a seeming increase in school violence in the '80s and early '90s, policymakers turned to zero tolerance policies to address issues involving weapons, drugs, and fighting. In fact, such policies were often statutory or policy responses to specific incidents of violence. The majority of schools now have zero tolerance policies for a variety of behaviors: 94 percent for possession of firearms, 91 percent for possession of non-firearm weapons, 88 percent for possession of drugs, 79 percent for violence, and 79 percent for possession of tobacco (National Center for Education Statistics, 2000). The definitions of zero tolerance vary, but generally, a zero tolerance policy requires predetermined punishment for specific acts, leaving little or no discretion to the school administrator.

Although good in theory, the application of zero tolerance has not escaped criticism. Few disagree with the purpose of such policies, namely, eliminating certain dangerous behaviors from schools in order to promote teaching and learning, but some unintended consequences have emerged as a result of their implementation. First, schools have expelled students for seemingly minor or harmless infractions. For example, a 10-year-old honor student was suspended when she accidentally brought to school her mother's lunch box, which contained a paring knife (Insley, 2001). Other examples include a 6th grader suspended for bringing a squirt gun to school; a 5-year-old suspended for wearing a five-inch plastic ax as part of his Halloween firefighter costume; and a 6th grader suspended for bringing a steak knife to school to cut the chicken in her lunch (Skibba & Peterson, 1999).

Another objection to zero tolerance policies is their potential infringement on student rights. Concerns include due process, free speech, and discrimination. For example, the Harvard Civil Rights Project and the Advancement Project report concluded that zero tolerance policies have a disparate impact on minorities (LRP Publications, 2000).

Conflicting data exist on the effectiveness of zero tolerance policies at preventing prohibited behavior. For example, statistical and anecdotal evidence simultaneously supports opposite conclusions about the effectiveness of the Gun-Free Schools Act (GFSA), passed by Congress in 1994, at reducing the number of weapons in schools. The following sources would seem to indicate a definite reduction:

- "School districts . . . continually educate children about the zero tolerance for weapons in schools . . . [a]nd officials say the policy has reduced the number of infractions" (Emily, 2000).
- The percentage of students carrying weapons on school property fell 28 percent between 1993 and 1997 (Brener, Simon, Krug, & Lowry, 1999).
- The number of student expulsions for bringing a firearm on school property dropped four percent from the 1997-98 to the 1998-99 school year (National Center for Education Statistics, 2000).

The problem with such statistics is that no one knows for sure whether the seeming decrease in weapons is due to zero tolerance policies or under reporting. To add to the confusion, schools that reported no crime were less likely to have zero tolerance policies for violence than schools that reported one or more serious crimes (National Center for Education Statistics, 1997). In the end, true numbers are elusive and the modest research conducted thus far does not indicate whether zero tolerance policies affect behavior.

Legal Considerations

Federal Law

Congress passed the GFSA to combat weapon possession in U.S. public schools. As a condition of federal funding, the GFSA demands that states do the following:

> Require local educational agencies to expel from school attendance for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of the local educational agency in that state, except that . . . the chief administrative officer of such local educational agency [may] modify such expulsion based on a case by case basis. (20 U.S.C. §8921)

This federal zero tolerance policy was passed because Congress felt that the United States needed "a national standard that says no guns in school and no excuses" (Congressional Record, 1994). Congress also stated, "If, as a Nation, we are committed to school reform and [committed to] meeting the education goals by the year 2000, we must be equally committed to providing students and teachers . . . with safe schools" (Congressional Record, 1993).

State Law

As a result of the federal GFSA, each state adopted its own version of the act that included, at a minimum, the federal definition of *weapon*. However, some states included a broader definition of *firearm/weapon*, or expanded zero tolerance to cover other offenses such as drugs or violence. For example, the

Virginia definition of *weapon*, for the purposes of the GFSA, includes a shotgun, whereas other states specifically exclude sporting weapons. Other examples of state GFSA policies include:

• Virginia: Gun and Drug-Free Schools Act. § 22.1-277.08 and 22.1-277.07. If the school board determines that a student has brought drugs or weapons onto school property, that student shall be expelled unless special circumstances exist to warrant another disciplinary action.

• Washington: ARCW §28A.635.090. When any student interferes by force or violence with any "administrator, teacher, classified employee, person under contract with the school or school district, or student" then grounds shall exist for immediate suspension or expulsion.

• Tennessee: Tenn. Code Ann. §49-6-3401(g). A student "committing battery upon a teacher, principal, administrator, any other employee of a local education agency, or school resource officer, or possessing any drug . . . shall be expelled for a period of not less than one calendar year, except that the director or superintendent may modify this expulsion on a case by case basis."

Case Law

The federal GFSA serves explicitly as the minimum that states must include in order to receive federal funding; as demonstrated by the above examples, it does not prohibit states from creating a more expansive, state-specific GFSA. Generally, zero tolerance statutes are upheld, even in states that have expanded the federal law. Courts usually defer to local school boards when it comes to disciplinary authority, as in the following examples:

• *Ratner v. Loudon Co. Public Schools* (2001). The court ruled that the suspension of a student for possessing a knife he had taken from a suicidal friend, though severe given the circumstances, was constitutional because the student and his parent had notice of the school's weapons policy and an opportunity to be heard. In other words, the school provided procedural due process.

• *Seal v. Morgan et al.* (2000). A mandatory expulsion policy for students possessing weapons violated the Fourteenth

Amendment because the policy allowed sanctions without finding that a student knowingly possessed the weapon.

• *D.G. and C.G. v. Independent School District Number 11 of Tulsa Co., Oklahoma* (2000). A zero tolerance policy on threats was challenged on First Amendment (speech) grounds. On the question of whether a student could be suspended for writing a threatening poem about a teacher, the judge wrote:

> It is impossible to have a "no tolerance" policy against "threats" if the threats involve speech. A student cannot be penalized for what they are thinking. If those thoughts are then expressed in speech, the ability of the school to . . . punish the speech will be determined by whether it was (1) a "true" threat, or (2) disruptive of the normal operation of the school.

Policy/Practical Considerations

• Check your state's laws and your local school board's manual for zero tolerance policies.

• Consider whether the application of zero tolerance policies increases delinquency in your state, school division, or school.

• Train staff in the legality and practical application of all zero tolerance policies.

• Plan for the education of those suspended/expelled, if required by law or policy.

• Implement a follow-up plan to monitor whether zero tolerance is having its intended effect. Also use monitoring to ensure that the policies are fairly and consistently applied.

Postscript

Under the federal GFSA, the superintendent has the discretion to recommend a case-by-case exception to the mandatory expulsion called for in the zero tolerance policy. The facts presented in the opening hypothetical situation seem to warrant invoking this statutory exception, at least for LaMar, if not Donna. Zero tolerance does not, and should not, replace common sense. Administrators and board members still must consider fairness and facts when implementing zero tolerance policies. Much of

the criticism surrounding zero tolerance lies in its application, or misapplication, rather than its existence. In short, zero tolerance policies do not replace the judgment of administrators and the school board.

Chapter 2

Commercialism in Schools

In response to consistent student population growth in the district, the school board decides to pursue a bond issue to renovate older buildings and to add classroom space. The initiative includes the construction of a new middle school that will house grades 6, 7, and 8. There is much excitement surrounding the construction of the building, which will bring with it enriched educational programs, carefully selected faculty, and fresh leadership.

The school community, faculty, and students aren't the only ones who are excited; owners of both large and small companies in the district are looking forward to the economic growth the school and its attendant programs will create in the business community. Electrical contractors, plumbers, carpenters, brick layers, architects, and engineers will all have additional work, and the need for materials, technology, and promotional activities for students and parent groups will present a wealth of business opportunities. Perhaps most important to the purveyors of commercial products and services, however, is the powerful market the school will supply—a captive audience of young people.

The new principal, Jim Baxter, is given a year to work on planning and preparation prior to the opening of the school. He spends most of that time selecting faculty and organizing programs, but he also has to deal with a constant stream of vendors proposing "opportunities" and "partnerships." Like most

leaders in the public sector, Jim is confronted daily with people far more skilled at selling than he is at buying. Not everyone who visits Jim is selling something, however. Many want to "give" the school a product or service under the auspices of community patronage. A local dentist, for example, wants to give every student a toothbrush with his name on it. Similarly, a pediatrician wants to distribute guidelines for good hygiene along with information about his practice. Retail merchants have book covers and mouse pads featuring the names and logos of their sponsors; fast food restaurants want to give away gadgets and coupons; and a host of businesses—video stores, record shops, shoe outlets—are proffering a plethora of "gifts" for the students, simply in order to gain a market advantage.

A computer company makes a particularly intriguing offer. Each teacher will receive a computer and a lab will be established for students if Jim agrees to endorse the company. Such an endorsement would require Jim to encourage parents and students to purchase their computers from this particular store if they want to be compatible with the software and technology students will be using at school.

Legal and Policy Considerations

Increasingly, schools struggle to retain funding for education. Even as government education budgets shrink, school demands continue to grow, thanks in part to increased accountability. As a result, schools have had to find creative ways to fund their goals. One method of raising additional money or acquiring needed supplies for students is through some form of commercialism. The degree of commercialism varies and may include exclusive contracts, vending relationships, fund raising, naming rights, direct and indirect advertising, sponsorships, endorsements, or leasing school property. Although such opportunities provide much needed cash for schools, they also raise a host of serious legal and policy concerns. According to one survey based on media references, commercialism in schools has been on the rise from 1990 through 2000, with a slight decline, overall, in 2001 (Molnar, 2002).

Generally, the legal issues associated with this emerging area fall under contract law and procurement law. Of the two, procurement laws more frequently address commercialism in schools, but by and large, decisions related to this issue have been left to the discretion of school boards. As commercialism in schools becomes more prevalent, however, responses from the public and, hence, legislators are expected. In some states, legislation already addresses commercialism by permitting it, regulating it, or prohibiting some forms of it and allowing others.

Commercialism in schools can provide great advantages for students, staff, parents, and the public, as well as financial relief for government funding sources. The trade off for the extra funding and/or supplies and equipment, however, is students' exposure to advertising, either directly or indirectly, while under compulsory attendance. Corporate America "pays" schools to gain access to students—a profitable market. Although a corporation's goal may be genuinely altruistic, it is always capitalistic as well—namely, to get students and their parents to buy and use certain products and services, and/or to build brand loyalty for future consumers. For example, in the now famous Channel One instance, schools received technology equipment in exchange for student exposure to two minutes of commercials.

State Law

Taking a step beyond the general coverage of contract and procurement laws, some states do specifically regulate commercialism in schools, at least in part. According to a recent Government Accounting Office (2000) report, "state laws and regulations governing commercial activities in public schools are not comprehensive and that, in most states, local school officials are responsible for making decisions about commercial activities in public schools." Nonetheless, some state laws do specifically prohibit, restrict, or permit some or all forms of commercialism in schools. The following are examples of such laws and regulations:

- N.Y. State Regents Rules § 23.2 prohibits certain promotional activity in schools. "Boards of education or their agents shall not enter into written or oral contracts . . . for which the

consideration . . . consists of a promise to permit commercial promotional activity on school premises. . . ."

• Wisconsin Code § 118.12(1) allows any person to "sell or promote the sale of goods or services" on school property except as prohibited, restricted, or provided for in school board guidelines.

• New Mexico Code § 22-28-1. "The right to sell advertising space on school buses shall be within the sole discretion of the local school board. . . ."

• Wisconsin Code § 118.12(4). "If a local school board grants exclusive rights to a soft drink vendor, then "the contract may not prohibit the sale of milk in any school and, to the maximum extent possible, the school board shall ensure that milk is available to pupils in each school covered by the [exclusive] contract."

• Florida Code §§ 1001.43 (2a) and (5). The district school board may adopt policies for (1) "sales calls and demonstrations by agents, solicitors, sales persons and vendors on campus . . . and (2) advertising in schools for business/community partnerships . . . [and] public solicitations in schools, including the distribution and posting of promotional materials and literature."

• California Code § 35182.5. The local school board may not "enter into a contract that grants exclusive advertising or grants the right to the exclusive sale of carbonated beverages . . . unless the [school board] has adopted a policy after a public hearing . . . to ensure that the district has internal controls in place to protect the integrity of the public funds and to ensure that the funds raised benefit public education, and that the contracts are entered into on a competitive basis pursuant to . . . Public Contract Code . . ." or a request for proposals.

The school purchase of goods and services is governed by state and, sometimes, local procurement laws. Depending on the type of commercialism and the value of the potential contract, procurement laws and local procedures may be invoked. It is very important to check state procurement laws and local policies and procedures before entering into any type of commercialism agreement or situation. A request for proposals or even a formal bidding process may be necessary.

Federal Law

Although no federal law regarding commercialism per se exists, national advocacy groups continue to lobby for such. For example, Commercial Alert, a nonprofit organization, is lobbying Congress to pass a "Parents Bill of Rights" that includes a prohibition against advertising in schools. (See http:\\www.Commercialalert.org for more information.)

Practical Considerations

School boards and administrators face pressure both from those who oppose commercialism and those who want additional funds to meet educational goals. Recently, some school boards have responded to this pressure by taking a no commercialism stance. For example, the Seattle School Board decided to phase out Channel One broadcasts. The situation with Channel One was that schools were offered television sets for every classroom in exchange for a block of daily time that students would be permitted to watch "news" and commercials. The deal was a marketing success, with advertisers of everything from jeans to records paying top dollar to get their wares in front of teen buyers. Although many school districts took the deal, others were skeptical of selling to a captive audience assembled through compulsory attendance laws. The Seattle School Board also prohibits advertising on score boards and school buildings, but it does allow logos for identification (rather than advertising). Other boards swing in the opposite direction, advocating commercialism to the fullest extent to provide for cash-strapped schools. Regardless of one's ideological stance on the issue of commercialism, below is a list of suggestions:

- Keep student interests at the forefront. Students' attendance at school is compulsory. Should policymakers allow marketers access to this captive audience? Or, are the extra funds so necessary to achieve the school's goals that exposure to marketing is acceptable? Each school board and administrator must make these tough policy choices. Perhaps a certain level of commercialism is acceptable for the cafeteria, but unacceptable for computers or textbooks. The pros and cons of each potential

"commercial" contract must be balanced against what is best for students. (In one instance, students were being encouraged to drink soda, even during class, in order to meet the vendor's quota requirements for the maximum pecuniary benefit to the schools.) Health issues, the role of commercialism in schools, and the financial and pedagogical effects of such commercialism must all be considered.

• Negotiate legal and practical obstacles with experience. Educators who engage in commercialism frequently express concerns about negotiating with experienced vendors. Administrators may be excellent educators and leaders, but are not usually experienced sellers or buyers as well. Knowing the ins and outs of the contracts and what exactly must be accomplished to receive the maximum financial or product gain is critical. Use knowledgeable and experienced people for negotiating these contracts.

• Check state law and local policy.

• Develop collective expectations (via staff, school board, community, corporate, and parent input) for school business partnerships. One principal suggests, "Get every corporate . . . partner to engage in a dialogue with students . . . tap [corporate] resources to drive and improve . . . curricula, and bring [the partner] full force into [the education] world at the same time [schools] venture into [the corporate world]" (Alexander & Riley, 2002).

Postscript

Jim has quickly discovered that in some instances, accepting a "gift" carries too high a price. If the computer company's proposal is consistent with school board policy, he can accept the computers being offered, but if the cost to students, parents, and the community is too great, then he will have to decline.

If no district policy exists that speaks to this request, Jim will need to ask if there are any state laws prohibiting sole source purchasing without extraordinary justification. Have other vendors in the community been given the same opportunity, and would any of them be willing to offer a better proposal? A final

caution should rest with the community. Will parents feel comfortable being locked into purchasing from one company? Jim has found that he must be savvy about those who come bearing gifts, and he has realized that true giving does not include an expectation of reciprocation.

Chapter 3

School Facilities

Community Use

Although the Overland School District has always included a strong religious community, growing diversity has added new faiths and cultures to the landscape. The dominant Christian churches represent a broad range of Protestant and Catholic doctrine, and the Jewish community, both conservative and reform, has steadily grown. Communication within the religious community is very strong and numerous community-wide events have been jointly sponsored. The National Conference of Christians and Jews annually provides an awards program for students from each high school who best represent humanitarian qualities.

Recently, a new Muslim center formed to provide a place of worship and cultural activity for the many refugees who escaped conflict in their homelands and settled in the community, some with relatives who have lived in the United States for many years. The Muslim center and its leadership have played a role in ecumenical groups in the community, but the terrorist attacks in New York City and Washington, D.C., on September 11, 2001, and the daily newscasts and articles that have focused on the Muslim faith and its tenets, have caused some strain in the relationship. Muslims and their children have been model neighbors. Yet leaders of our country have cautioned us to be more

vigilant of those who live around us. Nightly talk shows shout about the Muslims' fundamental hatred for Americans. Debates attempt to avoid profiling and stereotyping, but fear and suspicion often blur reasonable dialog.

A group of Muslim students are deeply concerned about the tension that fills each class discussion of world events and the doubt and misunderstanding that cast a shadow over their culture and faith. One morning, they approach the principal and ask if they can start a study group for prayer and Koran reading. They would also like to make it open to other students, who might, then, come to better understand and appreciate the Muslim students' faith and beliefs.

How should the principal respond to this request?

Background Discussion: Equal Access in Schools

Schools are focal points for communities. As non-school groups increase their use of school facilities, they gain a greater sense of pride in and ownership of those facilities. This is particularly critical when typically 70 percent of the homes in our communities do not have school-age children. These citizens have minimal contact, except through the media, with the very institutions that they own.

The issue of access usually includes two types of groups: student and community. The student organizations' purview has historically included religious activities such as prayer groups and Bible studies. Since the Equal Access Act (20 U.S.C. 407l-74) became law in 1984, the number of non-curricular clubs has grown significantly. Atheism, Goth culture, heavy metal music, and Satanism have all been introduced as focal points around which students have formed official, school-approved clubs.

Non-student groups frequently fall into two classifications: for-profit/not-for-profit and partisan/nonpartisan. Whether or not to charge non-student groups a fee for the use of school space and to whom that fee should apply are major policy considerations. The Girl Scouts, Boy Scouts, and even PTAs have been drawn into the debate as "similarly situated" nonprofit groups with churches and the activities of volunteer rescue

squads and fire departments. Meetings of political parties and candidate forums highlight the partisan side of this issue. Friday night high school football games become a major campaigning opportunity for candidates early in the fall election cycle. Which candidates get to purchase the back of the football program and who can distribute flyers, personalized footballs, or stickers? Where can candidates stand to campaign—off the grounds, at the ticket gate, inside the stadium? The potential problems with partisan politics become most acute when the election includes positions on the school board.

Although there is no legal requirement to open schools for non-school use or for non-curriculum student groups, there are obvious practical reasons to permit students and patrons to use the facilities as much as possible. For example, a growing number of senior citizens groups are looking for places to meet, and they must feel a sense of ownership of local schools if they are to be expected to support the next bond referendum or tax increase.

There are also opponents of non-school use of facilities. They argue that schools should be maintained for their primary educational purposes. In support of this view, they maintain that schools are not kept clean by outside groups, and that such groups may ignore or fail to take responsibility for damage. Further, they contend that some groups' requests for "temporary" use of facilities may belie a desire for a long-term arrangement in an attempt to avoid capital and operating expenditures. Perhaps an irony for those who pushed adamantly for the passage of an "equal access" law is that schools faced two choices: they could become equally accessible or equally inaccessible.

Legal Considerations

The use of school facilities is usually tested against the First Amendment Establishment Clause and the separation of church/state or through the Equal Access Act that addresses student speech in both religious and secular contexts. As noted by Phyllis Errico, former legal counsel for Virginia's Henrico County Public Schools, in a brief for the Commonwealth Educational Policy Institute (http://www.cepionline.org), the

non-school use of facilities is usually analyzed in the context of equal access and the type of forum that exists. Errico states:

> The courts recognize that public educational institutions and the boards that govern them have wide discretion over the use of property and facilities. However, the courts also acknowledge that use of these facilities must comport with state law and constitutional considerations, as this public property, if made available for other than educational use, must be made available in a fair, reasonable and nondiscriminatory manner.

An open public forum is generally described as those places that are accessible to the public at any time and for most activities. Parks and streets constitute places where the public is free to speak and engage in activities, provided that they are not illegal or an encroachment on the rights of others. Any conditions that are placed on the use of these areas must be applied the same way for all citizens and must demonstrate that the conditions are for a common good.

A limited public forum, which usually includes schools, is a public place that has been made available for a specific purpose. The primary use of the facility may be education, but patrons may be allowed to use the building when it is not being used as a school. Conditions may be placed on the use of facilities, but they must be applied consistently with all similarly situated groups or organizations. This can be particularly problematic if a private group is denied access when a privately constituted PTA or boosters group is allowed to use the facility.

A non-public forum includes those facilities that may not be used for public purposes. Buildings that require security, confidentiality, or simply a business environment may exclude the public from access. A single school facility or complex may include all three forums.

Federal Law

By the early 1980s there had been a number of court decisions involving the Establishment Clause. The Lemon test, involving the "excessive entanglement" of church and school, created guidelines for the courts and school administrators.

Student-led religious groups were routinely prohibited on school campuses, and the notion that the First Amendment prohibited any religious activity was pervasive.

With the support of conservative Christian groups, Congress passed the Equal Access Act in August 1984. A majority of both the House (337 to 77) and Senate (88 to 11) placed into law the conditions under which student-led, non-curriculum groups could be allowed to organize in secondary schools. The law applies to public secondary schools that receive federal financial assistance and that already have a "limited open forum." The limited forum means that non-curriculum groups—a chess club, for example—already exist and meet outside of the regular class time. The act provides that additional clubs must be allowed as long as the following provisions are met:

- Attendance is voluntary.
- Groups are student-initiated.
- The school does not sponsor the group.
- The group is not disruptive.
- Individuals outside of the school may not "direct, conduct, control, or regularly attend activities of student groups."

Groups and organizations must also be treated equally:

- Each club must have equal access to meeting space, the public address (PA) system, and school periodicals.
- School officials have the right to monitor meetings.
- Groups may be required to follow a common set of rules.
- The school may limit the number and locations of meetings.
- Individuals from the community may be prohibited from attending meetings.

Federal involvement in the use of school facilities typically rests with the First Amendment, Equal Access Act, and federal court decisions. The clear direction is that local boards may make rules related to use, but that the rules must be neutrally applied to student-led groups if other non-curricular activities are permitted. In the case of community groups and the use of facilities, school districts may not prohibit religious groups from using school buildings if a limited public forum already exists.

State Law

State policies generally reflect the guidelines and principles inherent in the federal legislation and court decisions. Clearly, however, there are still open issues around the use of school facilities. The Mergens decision noted that the Equal Access Act might be in conflict with individual state constitutions. As cited on a Canadian Web site maintained by the Ontario Consultants for Religious Tolerance (http://www.religioustolerance.org), in 1996, the Salt Lake City Board of Education eliminated all extracurricular clubs when confronted with the request of a gay/lesbian support group. In 1999 in California, the Orange Unified School District attempted to prevent a Gay-Straight Alliance Club from meeting and was stopped by a U.S. District Court judge. In 2001 in California, the Saddleback Valley Unified School District ruled that a chapter of the Fellowship of Christian Athletes could not meet at Mission Viejo High School. Although a lower court supported the school district, the California Court of Appeals ordered the district to recognize the club and to give it access to school facilities and in-school media. In 1994, the Virginia Board of Education issued the Guidelines for Religious Expression in Public Schools, and in 1995, Secretary of Education Richard Riley and Attorney General Janet Reno, under the direction of President Bill Clinton, issued similar guidelines from the U.S. Department of Education.

Case Law Examples

Board of Education v. Mergens (1990). The U.S. Supreme Court ruled that the Equal Access Act was constitutional. A group of students had not been permitted to start an extracurricular Christian group that would include Bible study, fellowship, and prayer. The school already had chess, scuba diving, and service clubs. The Court supported the students in an 8–1 decision.

Pope v. East Brunswick Board of Education (1993). The court extended the coverage of the law to schools that allow only extracurricular clubs that are faculty-initiated.

Hsu v. Roslyn Union Free School District No. 3 (1996). Even though the school had a general rule of non-discrimination

based on religion, the court required the school to allow the Christian club to discriminate in the election of officers.

Lamb's Chapel v. Center Moriches Union Free School District (1993). An evangelical church had been denied a request to use the school to show a film promoting traditional Christian family values on the basis that the school could not be used for religious purposes. The U.S. Supreme Court ruled that the school district had permitted the use of school facilities for social and civic groups and could not deny the church because of the religious content of the film.

Policy Considerations

Local school boards and handbooks of individual secondary schools should be reviewed for compliance with federal law. Particular attention should be paid to the existence of a limited public forum and the rules that will apply to any group that requests permission to use school facilities. These rules should be neutrally applied in the context of either student-initiated or community-based organizations. The involvement of staff should be addressed in the policy, with a clear distinction that the faculty or staff sponsor of the group is limited to supervision and may not participate. The involvement of "outside" adults should be prohibited in student-initiated groups. Policies should also clarify if this prohibition includes community speakers. The use of school announcement periods and equipment such as the PA should be specified for all student groups. In the case of community groups, similarly situated organizations should be made aware of the approval process, staff requirements, costs and duration of use, and expectations for behavior in the facilities.

Practical Considerations

Although the tragedies of September 11, 2001, may have highlighted prejudice, fear, and suspicion, the Equal Access Act of the United States provides that each student-initiated or community group must be treated equitably in their requests to use facilities that offer a limited public forum. It would seem,

therefore, that the principal's decision is an easy one; however, a principal's judgment is never weighed against the law alone, but also against the needs and desires of the students and citizens who will see and feel the effect of its application. Perhaps the principal should contemplate a few questions before making a decision:

- Do we have a school board policy, and do I understand what it means with respect to this issue?
- Is this issue addressed in our student handbook?
- Is this an opportunity to use religion as a vehicle to teach tolerance?
- Can I appeal to the clergy in the community to help with the understanding of the law and its implications for all student-initiated groups?
- Are there groups that I will not permit to meet in the school due to the focus/content of their gatherings (Satanism, Goth culture, and others)?
- How have other schools in our area addressed this issue?
- Should I consider requesting the elimination of all student-initiated groups?
- How can I use student leaders to bridge this issue with the potential factions within the student body?
- How can I engage the PTA, boosters, and other school/community groups to discuss this topic openly?
- How can this request be used to inform students and patrons about the growing diversity of the school and district?
- Should I meet with the Muslim students and attempt to persuade them that their timing could be better?
- How can I prepare the community for my decision?

Postscript

The principal in this case confronts a major test of both equity and sensitivity. Despite the concerns of some in the community, the Muslim request must be treated in the same fashion and with the same disposition as a request from any other religious group in the community. If young people are permitted to meet, but the meetings are not publicized through routine communication

channels, then the same standard should be applied to the new request. The real problem with this request may lie with the desire to "open" the group for the purpose of furthering understanding, as this same argument could be used to mask an intention to use the meetings as a means of proselytizing. The principal must also gauge the emotion that may come to the fore as a result of the September 11 terrorist incidents and move to both accommodate the request and protect the students who may be meeting. This very real case also provides an opportunity to bring together student and community leaders to work through the common issues of security and tolerance.

Health Related Issues

For several months, members of the board have reported that the staff at the Doheny Island Elementary School has been complaining about odors in the building. In response, the superintendent has asked the facilities team to check the building for air quality. Air samples have been taken during weekends and with the Heating, Ventilation, and Air Conditioning (HVAC) system shut down. In addition, the school nurse has been monitoring the records of student illnesses and staff absences.

Five years ago, the school district confronted community concerns about Environmental Protection Agency (EPA) press releases related to radon. After identifying the geographical areas that had the highest propensity for radon, the district conducted tests in each school and found that all of the tested facilities had either negative or acceptable levels of the gas present. The district has also confronted concerns about Alar on apple products served in the cafeteria, lead in water fountains, and asbestos abatement. In the latter instance, several million dollars were spent to satisfy EPA standards (removal, encapsulation, and containment), all of the known potentially friable asbestos was removed, and an abatement plan was approved by the state following a review by its consolidated laboratories. An EPA inspector later visited the school district, citing it with a violation due to a crack in a ceiling tile where asbestos had

previously been deemed properly contained. Though the district was later exonerated of any charge, the memories of community concerns, court costs, loss of staff time, and the debilitation of the board and superintendent remain vivid.

The nurse at Doheny Island Elementary has found very little deviation in the pattern of student illnesses from year to year, but there have been isolated instances where children with allergies have complained about increased irritation. One physician in the community has indicated that he is concerned that the building is "sick" and should be closed. Faculty members are being the most vocal about the perceived problem, and some have started to complain to the union that the building is not a safe place to work. One teacher, Judith Anderson, who has had a persistent record of illness, is particularly concerned about being in the building and has requested a transfer. She has shared those concerns with parents, and they, too, are alarmed and have asked for a meeting with the superintendent. The principal has indicated that she cannot detect an odor in the building, but acknowledges that she has had daily complaints from the staff.

As the complaints persist, the facilities team continues to work with the local health director and private contractors to take samples and evaluate the air quality. At two consecutive monthly board meetings, concerned parents and teachers have appeared and complained that the building is not safe. Despite the steps being taken to ensure air quality, these concerns have not lessened. In fact, the intensity of distress, both public and privately expressed, is escalating. A meeting is scheduled in the building so that the board and superintendent can explain to the community the steps that have been taken and to hear citizens' concerns.

How should the superintendent handle this crisis, and what are the legal and policy implications?

Background Discussion: Sick Building Syndrome (SBS)

Since the 1980s, there have been an increasing number of "sick school buildings," so many, in fact, that the Environmental

Protection Agency has developed a tool kit for teachers to determine if the air quality in their buildings is safe. In addition, the National Education Association has a Web site for members detailing the hazards of poor air quality in schools, and one teacher has even created a personal Web site chronicling his battle with an elusive but very real malady brought on by SBS.

The symptoms are typically triggered by the presence of one or more elements: combustibles, moisture (mold and mildew), airborne infectious agents, volatile organic compounds (VOCs), formaldehyde in new carpet and building products, particle board, and applied poisons including pesticides, insecticides, rodenticides, and herbicides. Once detected, the problem is typically addressed through investigation, management planning, and remediation monitoring.

Many health care providers and scientists use research to validate symptoms associated with SBS, but others argue that SBS is merely a diagnosis in search of a disease. Many remember the late '80s when celebrated actress Meryl Streep claimed on CBS's "60 Minutes" that treating apples with Alar (a growth regulator) was "intolerable" and posed a risk of cancer to children. She also traveled around the country telling mothers that they should wash apples with soap and vinegar to reduce the risk. Scientific studies, however, indicated that there were never any risks posed by traces of Alar. Yet, with no proof, thousands of schools were forced to stop serving apples while facts were sorted from fiction. The economic effect was significant as well. Hence, many questioned whether this clarion call for the identification of "sick buildings" was but another Alar scare. But for those enduring headaches, allergies, respiratory problems, dizziness, nausea, and fatigue, it was very real.

Legal and Policy Considerations

As the number of buildings believed to be "sick" has risen, the legal community has experienced an attendant increase in the number of cases involving sick building syndrome (SBS), along with related claims such as multiple chemical sensitivity and the effects of electromagnetic fields. The allegations typically assert

that a building is "toxic" and hazardous to the health of employees and other occupants. Claimants are usually individuals who have acquired sensitivity to chemicals or particles of mold that have been released in the air. The primary host for the contamination is the ventilation system, especially where ductwork has a liner that can be exposed to moisture that becomes trapped. New buildings that are sealed for energy efficiency can also pose air quality problems. In one case, a building had high mold counts from the liner in the ductwork and was under positive pressure because the HVAC system capacity was overrated; teachers complained of their ears popping. Claimants frequently allege that the conditions from which they suffer negatively affect their entire lifestyle—that is, they are unable to function normally at work or at home. Some physicians have even associated the diagnosis with the pain and fatigue of the musculoskeletal disorder fibromyalgia.

Although opinions about liability range from negligence to battery, the cases have been hard to prove. In the *Chicago Law Bulletin* (1998), Susan Hickman, a partner with Henshaw and Culbertson, noted that lawsuits over health problems allegedly caused by school, office, and residential buildings are booming. In the same article, Jack Barnette, a chief with the EPA, expressed concern that the EPA has not adequately identified the potential breadth of the problem, noting, for example, that the agency has no position on the issue of carpeting versus no carpeting in schools. While the scientific scope and nature of the problem is debated and the cases proliferate, the courts continue to give schools consistent direction that might affect policy. However, it seems that practical instruction comes only from the EPA and a variety of advocacy organizations.

Case Law Examples

Bartlett v. Moore Business Forms, Inc. (2000). An employee of the Tomiki County Department of Social Services claimed that she had been exposed to toxins, including "NCR forms." Her physician testified that she had acquired "multiple chemical sensitivity" due to exposure to carpet and glue at her place of employment. A physician with the New York Occupational

Health Center also testified that the claimant had been exposed to chemicals in a building that was not well ventilated. The charges in the case were dismissed due to the absence of scientific evidence that the medical conditions were caused by the building and a failure to file within the statutory limits.

Murray v. Apfel (2000). Mrs. Murray, the plaintiff, had quit her job as a bookkeeper in the City of Long Beach, California, in 1992. When she was denied social security benefits, she sought relief before an administrative law judge. Her claim was denied on the basis that her allegations of exposure to sick building syndrome were not credible. On appeal, the court found that the plaintiff was, in fact, disabled by the exposure and unable to return to work. She was therefore entitled to disability benefits. A similar case is *Knapp v. Vestal Cent. School Board, et al.* (1998), involving a music teacher who claimed that she experienced symptoms such as fatigue soon after being transferred.

Federal Policy

The primary federal voice on these issues is the EPA. The agency's Web site (http://www.epa.gov) includes a kit that can be used by teachers and staff to test the safety of their schools. In response to questions related to Indoor Air Quality (I.Q.), the site also offers a handbook that discusses causes, methods of investigation, and solutions. Reference is also made to the American Society of Heating, Refrigerating, and Air-Conditioning Engineers standards directed at improving ventilation.

The Occupational Safety and Health Administration (http://www.osha.gov) of the U.S. Department of Labor has an exhaustive list of references related to SBS, as well as volatile organic compounds. A review of these materials should be included in any crisis planning.

State Policy

A variety of state agencies may have responsibility for Indoor Air Quality (I.Q.). Departments of emergency services, environmental quality, pesticide control, and agriculture may have generated guidelines, regulations, and policies specific to the complaints that have been raised. State laws should also be

reviewed for statutory provisions related to SBS, employer liability, and methods of redress. Although state codes may not dampen or erode the effect of federal law, in many states, legislation has been passed that establishes more restrictive conditions with harsher penalties. The board of education for the district in which a complaint originated may have addressed SBS or building-related illness in its regulations, or the facilities section of the state Department of Education may have developed guidelines.

Practical Considerations

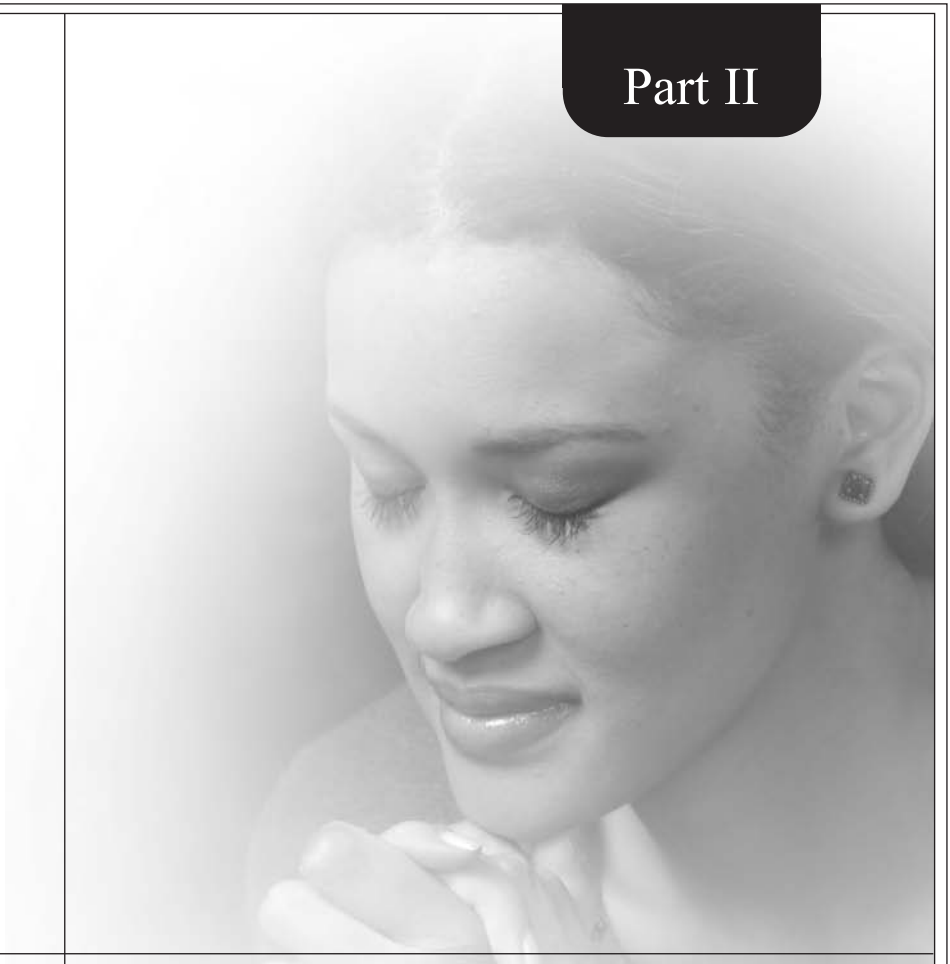
- Listen carefully to all complaints and document specific health issues.
- Contact the health officer for the county/city and ask that employees and students with symptoms be interviewed and evaluated.
- Ask the health officer to establish contact with families and other public health officials.
- If the school district has an I.Q. specialist, request an analysis of the complaints and testing.
- Keep faculty and the community informed of the work that is being done and the results that are found.
- Maintain a checklist of steps taken to investigate all complaints.
- Work closely with the school district public relations department and local media to minimize the hysteria and misinformation that can be generated by these issues.
- Review attendance records for students and staff.
- Check district policies for references to clean air.
- Be sure to take all complaints seriously.

Postscript

The superintendent should hold the meeting with parents and staff and present all of the results that have been gathered thus far. Although local health director should share the burden of explaining health issues to the public, it is also prudent to have

the results reviewed by outside authorities whose reputations in the field will be credible to all concerned. The legal authority in these cases seems to speak far more to symptoms than remedies. The only solution that is offered by federal agencies is frequently "removal," with any other alternative tied to onerous requirements for notification. Again, safety should always be the primary standard. If the number of cases seems to be limited to a small group of students and/or staff, other options may be provided for them. In cases where either the information is not conclusive or the community has lost confidence in the facility, the only course may be to vacate the building and retrofit the systems that could be housing or causing the problem. The sophistication of current testing methods allows for most health problems to be detected and resolved. The key is to take each step with the community and staff in the most visible fashion available and to be completely honest in providing all results and conclusions.

Part II



Constitutional Issues

Chapter 4

Religion in Public Schools

Prayer

In 1992, following on the heels of the U.S. Supreme Court's decision in *Lee v. Weisman* (1992), the Smithburg Public School District changed its policies regarding prayer at graduation and during school-sponsored extracurricular activities. On the advice of legal counsel, the school board went on record as forbidding all types and forms of prayer (whether vocal or silent) during the school day and at all school-sponsored events. The new prohibition applied to every school in the school system, and to all administrators, teachers, coaches, support personnel, and students.

In July 2001, Ernesto Sanchez is appointed as the new superintendent of schools. Two months later, feeling very much affected by the horrible events of September 11, Ernesto decides that it is time to revisit the school board's prayer ban policies. He wants to recommend to the board that students at the elementary, middle, and secondary school levels have opportunities to engage in prayer at any time they feel moved to do so during the school day, as well as during any school-sponsored activities, especially graduation. Ernesto also wants to recommend to the school board chair that the board itself set an example by praying at the beginning of each school board meeting.

Prior to making an official recommendation to the school board, Ernesto decides to poll the attitudes of school principals, teachers, students (at all grade levels), parents, and members of the community. He wants to know what a representative sampling thinks about reinstating prayer in the schools. He especially wants to know what the high school students and their parents think about reinstating prayer at graduation exercises and at such extracurricular activities as athletic events.

Three days after the questionnaire is mailed, Ernesto receives a telephone call from John Allen, a parent of two children attending school in Ernesto's district. John lets Ernesto know that he is calling on behalf of Parents Against Prayer in Schools (PAPS). "In the opinion of the PAPS membership," says John, "prayer in public schools, at school board meetings, at graduations, and at school-sponsored activities is illegal and unconstitutional. PAPS is ready to bring a lawsuit if school board policies are changed." John proposes the following alternative plan as being acceptable to the PAPS membership: (1) Allow for a formal minute of silence at all school board meetings and at the beginning of each school day, (2) allow all students who choose to pray during the school day to do so in a non-disruptive way, and (3) allow for a moment of silence at all graduations and at extracurricular activities, including athletic events.

Ernesto sits back in his chair and contemplates his next move. John Allen's proposal seems very reasonable. Plus, he knows that PAPS is well organized and means business. At the same time, Ernesto knows that some influential members of the community are adamant; they want a blanket policy that reinstates student prayer (both silent and vocal) in every school.

What should Ernesto do?

Background Discussion: Prayer in School

Prayer in U.S. public schools, including in classrooms and on athletic fields, has deep historical roots. For many years, in all parts of the country, the school day began with prayer and scripture reading; graduations began with an invocation and ended with a benediction, often led by a member of the clergy;

baccalaureate (a voluntary, non-denominational religious-oriented ceremony for graduates and their families) was celebrated in the school auditorium; and interscholastic athletic teams had a coach-led prayer before the game began. Such activities were considered a part of accepted tradition.

Legal Considerations

In the early 1960s, the U.S. Supreme Court decided several cases where prayer (including devotional exercises) in public schools was the main issue. The sum and substance of these decisions was that under the Establishment Clause of the First Amendment to the U.S. Constitution, state government and its agencies and agents must assume a neutral position in matters of religion in public schools. More specifically, although "teaching about religion" likely would pass constitutional muster, the high court clearly stated that religious instruction, government-sponsored (i.e., endorsed) religious exercises, and officially sanctioned and organized prayers in public schools would not be tolerated. The Supreme Court was sensitive to the fact that students in a public school environment are strongly influenced by their teachers and their student peers.

At the close of the 1960s, in a separate line of cases dealing with student First Amendment rights, the Supreme Court, applying the "material and substantial disruption" test created in *Tinker v. Des Moines Independent School District* (1969) expanded Free Exercise Clause protections to public school students. This line of decisions involved situations where the First Amendment's protection of free exercise of religious beliefs merged with the freedom of speech guarantee to produce a notion of religiously motivated student expression (e.g., student clubs, students gathering silently around the school's flagpole, and others).

As issues of student prayer (especially prayers at graduation exercises and at athletic events) and in-school devotional exercises (especially at the beginning of the school day) continued to flourish in the 1970s, '80s, and '90s, the Supreme Court wrestled with the following constitutional dilemma: Can a balance be

maintained between the neutrality, non-endorsement requirements of the Establishment Clause and the free expression guarantees of the free exercise clause? The dominant standard applied in the Court's analysis was the three-pronged test created in *Lemon v. Kurtzman* (1971).

The First Amendment to the U.S. Constitution reads, in relevant part, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." The Fourteenth Amendment made these rights applicable to the states. Public school systems, as arms of state government, must therefore abide by the requirements of the First Amendment.

Devotional Exercises and Graduation Prayer

In the early 1960s, the recitation of officially sanctioned prayers and Bible reading, as devotional exercises in public schools, were found in violation of the First Amendment. (*School District of Abington Township v. Schempp,* 1963; *Engle v. Vitale,* 1962; and *Chamberlin v. Dade County Board of Education,* 1964.) In 1971, the Supreme Court created a three-question standard with applicability in all matters where the First Amendment's Establishment Clause was involved, especially where student prayer, Bible reading, and devotional exercises in public schools were challenged. The test requires that the following questions be asked: (1) Does the activity have a clearly secular purpose? (2) Does the activity either advance or inhibit the free exercise of religion? (3) Does the activity excessively entangle the public school system with religion? (*Lemon v. Kurtzman,* 1971).

In *Lee v. Weisman* (1992), the Court directly addressed graduation prayer in public schools. By a vote of 5–4, the Court held that allowing a member of the clergy to offer an invocation and benediction as part of an official public school graduation, where the school principal had a direct role in the selection of the prayers to be said, violated the Establishment Clause of the First Amendment. The Court in *Lee v. Weisman* did not address the following question: Is there a difference between a student, as graduation speaker, talking about something religious in nature, and a student who actually leads the assembled students in a prayer? The speech of an individual simply expressing and

sharing a religiously based point of view with those assembled is different from preaching religion to those assembled. The latter activity might, in effect, change a secular graduation ceremony into a religious ceremony.

Extracurricular Activities

Although the Supreme Court has not handed down a decision directly addressing prayers at extracurricular activities (e.g., interscholastic athletic teams), it has addressed such issues as moments of silence at the beginning of the public school day and prayer before high school football games. Regarding state statutes authorizing a moment of silence at the opening of the school day in all public schools, the Court has held that the First Amendment requires the invalidation of such laws where the advancement of religion is the primary legislative purpose. To put it another way, where the true intent of the law's sponsors is to return prayer to the public schools, the moment of silence statute fails to meet Establishment Clause requirements (*Wallace v. Jaffree*, 1985).

Regarding organized, vocal prayer before a public high school football game, the Court has also found Establishment Clause violations. The fact that the prayers are led by a representative of the student body, the recitation takes place on school property, and the event itself is supervised by school personnel conveys a message of official endorsement by the school system (*Santa Fe I.S.D. v. Doe,* 2000).

Minute of Silence

A minute (moment) of silence invokes both the free exercise clause and the Establishment Clause of the First Amendment. As such, public school administrators and teachers must endeavor to balance the rights of students present. One way to achieve this is to allow for and insist that the purpose of the activity is to create a moment of silence. Proponents of the moment of silence say it simultaneously accommodates religious expression while providing the secular purpose of maintaining order and discipline, and preventing violence in schools. Whatever the reason for establishing a moment of silence, some critics say that it is a

veiled attempt to return organized prayer to the public schools. Others, however, believe it is a part of the solution to the growing problem of disorder and violence plaguing many public schools. The implementation of a minute of silence by statute or policy is permissible as long as the primary purpose is pedagogical and not to return organized prayer to the schools. As noted above, the U.S. Supreme Court, in *Wallace v. Jaffree* (1985), struck down the Alabama moment of silence statute that permitted a period of silence for "meditation or voluntary prayer" at the beginning of the school day. The Court reached its decision based on the legislative history of that state law, which showed a clear intent by the law's sponsors to return organized prayer to the public schools of Alabama.

In 1983, the Supreme Court deemed it constitutional for a state legislature to open its session with prayer. The Court concluded that "the opening of legislative and other deliberative bodies with prayer is deeply embedded in the history and tradition of this country" and therefore is constitutional (*Marsh v. Chambers,* 1983). The Supreme Court has not addressed the issue of public school board prayer. However, at least one lower court has determined that a school board meeting is not a deliberative body, but rather a school activity subject to the *Lemon* test (*Coles v. Cleveland Board of Education*, 1999). In *Coles*, the Sixth Circuit concluded that the school board is "an integral part of the school system" and therefore is subject to judicial precedent concerning public school prayer.

Not all experts agree with the *Coles* decision. Some attorneys and scholars believe that a formal school board meeting is an adult function, and prayer among adults is different from prayer among students in a school or at a school function. Moreover, prayer merely being present at a school board meeting does not change the nature of the school board's secular policymaking function. The fact that students may be present at a school board meeting is irrelevant.

Federal Law

There are no federal statutes specifically covering student prayers at graduations. Similarly, there are no specific federal statutes directly covering devotional exercises in public school

classrooms or as a part of an interscholastic athletic team's routine. Thus, where federal questions are raised, they typically are characterized as constitutional issues. However, there are federal statutes that may indirectly apply to the issue of religion in schools. Take, for example, a situation in which a public school principal, fearing the delivery of a religiously motivated message, refuses to allow a student to function as the graduation speaker, solely because of the student's membership in a school Bible club. In this case, the Equal Access Act may apply. Further affecting how or if the Equal Access Act would apply would be the principal's past actions. In other words, has the principal, in the past, let other students speak at graduation without considering their club membership as a selection criterion?

Directives might spring from a national executive branch initiative, rather than from the law. An excellent example is the document entitled *Religious Expression in Public Schools: A Statement of Principles*, published in 1999 by the U.S. Department of Education under the Clinton administration (U.S. Department of Education, 1999). This comprehensive document encouraged public school systems to treat religion with fairness and respect, and to protect students' right to express their religious beliefs while in school. Public school administrators and teachers were advised not to discourage discussions and other activities that would provide students with opportunities to learn about each other's beliefs simply because they might be religious in nature.

Under the No Child Left Behind Act (2001), which re-authorizes the Elementary and Secondary Education Act (Sec. 9524), Congress requires local school systems, as a condition of receiving federal funds, to certify in writing that no policy prevents or denies participation in constitutionally protected prayer. The Secretary of Education, under the law, is directed to issue guidelines to state and local school boards regarding constitutionally protected prayer.

State Law

It is important to search the statutes of the various states, as well as the decisions of the state courts and the opinions of state attorneys general, to determine the legal requirements and prerogatives of local public school boards in matters of religion in

schools. For example, some states allow voluntary student-initiated prayer in schools (e.g., Code of Virginia 22.1-203.1), while other states require that the public school day begin with a mandatory moment of quiet reflection or silence (e.g., Code of Virginia 22.1-203 and O.C.G.A. 20-2-1050). Other states officially close all public schools and state offices on Good Friday (e.g., Maryland). Thus, issues regarding prayer in school vary from state to state.

Case Law Examples

McCollum v. Board of Education (1948). In a case where religious instruction on school property was declared in violation of the Establishment Clause, the Supreme Court stressed the possible pressure on students to conform and participate in school-sponsored activities. The Court cautioned school officials that simply because a student is offered an alternative to participation, that does not lessen the influence on him or her to participate. Students may automatically feel pressure to conform when an activity occurs within the school.

Engel v. Vitale (1962). Here, the Supreme Court cautioned against students feeling coerced to participate in reciting a state composed prayer at the beginning of the school day. In the words of the Court, "governmental activities that operate directly to coerce non-observing individuals to participate" will not pass muster under the Establishment Clause.

Stein v. Oshinsky (1964). Voluntary prayers by public school kindergarten students were invalidated. The students had been reciting prayers in the morning and afternoon. Although many parents wanted the practice to continue, the court held that there is no constitutional duty on the part of public school officials to permit prayer in state-owned buildings.

Lemon v. Kurtzman (1971). When applied to Establishment Clause issues raised in cases where organized prayer and/or Bible reading at graduation, during morning exercises, or during extracurricular activities are present, the following questions will be asked: (1) Does the activity in question have a clear secular (educational, ceremonial, non-religious) purpose? (2) Does the activity establish religion or interfere with the free

exercise of religion? (3) Does the activity excessively entangle school officials with religion?

Hunt v. Board of Education (1971). The court upheld a local school board's decision to refuse permission to senior high school students to use school property for prayer meetings. The fact that the meetings were voluntary in nature, were held before school began, and did not involve a faculty sponsor did not influence the court's decision.

Karen B. v. Treen (1981). A state statute permitting classroom teachers to have student volunteers lead the class in prayer violated the Establishment Clause of the First Amendment.

Collins v. Chandler (1981). The court ruled against the practice of school officials granting permission for prayers to be said at school assemblies. The fact that the student assemblies were considered voluntary did not sway the court's opinion of the exercises.

Karcher v. May (1987). The Third Circuit held that a state statute allowing teachers to conduct a minute of silence at the beginning of the school day was unconstitutional because the legislature's intent was to provide students the opportunity to pray.

Lee v. Weisman (1992). The Supreme Court ruled that graduation prayer at a public middle school was unconstitutional under the First Amendment's Establishment Clause. In the Court's view, the graduation prayer process showed a pervasive involvement of the school administration—in this case, the principal—thus creating an impression of official endorsement. In its decision, the Court also created and applied a new standard called "coercion." More specifically, the Court's majority held that even though attendance at graduation was voluntary, students felt pressure (official pressure and peer pressure), whether real or imagined, to attend and to participate in the ceremony. In other words, voluntary participation was not really voluntary.

Jones v. Clear Creek I.S.D. (1992). In this case, the Fifth Circuit Court upheld the practice of prayer at graduation, because the prayers were both student-initiated (students had voted to include prayer at graduation) and student-led (by a student

volunteer). The court warned, however, that school officials must not force students to take part in the ceremony's invocation or benediction, and the student leading the prayers must not proselytize those in attendance.

Brown v. Gwinnett School District (1997). A Georgia law required teachers to provide a minute of quiet reflection at the beginning of each school day. Applying the *Lemon* test, the Eleventh Circuit Court found the state statute constitutional because it (1) disclaimed any religious purpose; (2) did not affirmatively authorize any religious activity; (3) did not prevent student-initiated, voluntary prayer; and (4) allowed students to reflect on the anticipated activity of the day.

Chandler v. Siegelman (2000). A state law permitting student-initiated, nonsectarian, non-proselytizing, voluntary prayer at school-related events (whether or not the event is compulsory) was challenged. The court held that suppressing student religious speech would show hostility toward religion and not neutrality. The court added, however, that this form of student speech is subject to the same time, place, and manner restrictions as are other forms of student speech.

Adler v. Duval County (2000). A local board of education policy permitting graduating students to vote on whether or not to select a student to "deliver a message" of his or her own choosing at the opening and closing of the graduation ceremony does not violate the First Amendment's Establishment Clause.

Brown v. Gilmore (2001). A state statute mandating a moment of silence in every public school at the beginning of the day does not violate the Establishment Clause of the First Amendment. Establishing a moment of silence is the intent of the statute, and silent prayer is but one listed option from which students may choose.

Policy Considerations

In addition to the constitutional and legal considerations associated with prayer at graduation, as a part of a devotional exercise, or during an extracurricular activity, it is important to apply the requirements of local school board policy. What follows are

some suggested questions to ask when examining local school board policy:

• Does the school board make it clear that it is vested with legal authority to make all policy governing curricular and extracurricular activities on school property and at all school-sponsored activities, on or off school grounds?

• Is there a school board policy specifically addressing graduation prayer?

• Does the policy forbid the recitation of any form of prayer (whether called an invocation, benediction, message, thought, moment of silence, or other) or does it permit some form of voluntary, student-initiated activity (e.g., a "student message") at the beginning and/or end of the graduation ceremony?

• Where a student-initiated message is permitted at graduation, does the policy make it clear that the school board's intent is to establish a student-oriented ceremony and an atmosphere where free expression of ideas is encouraged, and not to endorse the inclusion of prayer at graduation, especially where a student decides to give a religiously motivated message?

• Is there a specific policy addressing whether baccalaureate ceremonies are permitted and, if so, the location of such activities (i.e., on or off school property)?

• Is there a specific policy addressing devotional exercises on school property (especially in classrooms) and at school-sponsored events?

• If a policy exists, how does it define the term *devotional exercise*?

• Is there a policy specifically addressing all forms of prayer as a part of any extracurricular activity (including interscholastic athletic teams)?

• Is there a policy that permits "moments of silence" and other silent exercises (prayer included), where students (including athletes) decide to have such?

• Does the policy make it clear that administrative staff, teachers, coaches, and support personnel shall refrain from encouraging, organizing, or leading students in prayer or any other form of religious exercise as a part of any class or extracurricular activity?

- Is there a separate policy on school board prayer?
- Are school board meetings conducted on school property?
- Are students required to attend school board meetings?
- Do student representatives serve on the school board?
- Is there a past history of school board prayer in the school district?
- Does a member of the clergy lead each school board prayer?
- Is the school board prayer directed only at school board members?

As a new superintendent of schools, Ernesto must be sensitive to the fact that he is perceived as the "new guy on the block." As such, he must proceed cautiously and resist the temptation to make abrupt changes in school system operations. In this situation, where the emotionally charged subject of school prayer is involved, change, if it is to take place, must be gradual.

Ernesto must also consider the fact that the school board's blanket policies forbidding prayer at graduation and during school-sponsored and extracurricular activities, and forbidding any form of prayer—vocal or silent—said by students, teachers, coaches, and other staff members, have been in effect for almost a decade. Moreover, it behooves Ernesto to keep in mind that the existing policies were drafted and implemented on the advice of the board's legal counsel.

Further, Ernesto must recognize that the U.S. Supreme Court has made it clear that public school boards, administrators, and staff must maintain neutrality in matters of religion. At the same time, however, boards, administrators, and staff must not act to interfere with an individual's free exercise of religion. Thus, whatever changes occur must strike a balance between these two constitutional requirements.

Finally, Ernesto must not forget that he has sent out a survey to parents, administrators, teachers, and members of the community. He cannot ignore that survey and its results. Nor can he ignore the demands and formal suggestions of John Allen's group, Parents Against Prayer in Schools (PAPS).

Given the above factors, Ernesto should consider the following suggestions:

• Establish a formal committee to advise the superintendent and board on the prayer issue.

• Ensure that the committee's membership is representative of the various stakeholders (teachers, students, parents, PAPS, the community-at-large).

• Make it clear that the committee's charge is limited to an audit of the school board's existing policies on prayer at school and at school-sponsored events.

• Establish the committee as the body to receive, tabulate, and consider the results of the community survey regarding the reinstatement of prayer in school.

• Make it clear that the committee's report and any accompanying recommendations shall be made to the school superintendent and the school board.

• Finally, make it clear that the school board, in consultation with its legal counsel, retains the final decision-making authority over all matters of school system policy.

Postscript

The superintendent is likely to find himself caught between the community and the Constitution. Although the pervasive sentiment in polls and surveys is that community patrons would like to see prayer permitted in a public forum, the school district must protect the rights of all citizens. The balancing act that comes with this obligation is tricky at best.

The argument for prayer is usually grounded in the reality that Congress, legislatures, and courts generally convene with a prayer or some reference to God. Whereas the graduation restriction is very specific, the day-to-day accommodation of prayer has more flexibility. Courts have affirmed the rights of states and districts to have policies that offer a moment of silence during which students can pray. Additionally, except in limited jurisdictions, boards have been allowed to open their meetings with prayer. School districts have typically let this decision follow the advice of legal counsel; however, there may also be another commonsense alternative. Undoubtedly, some groups will be adamant about using a specific prayer from a

dominant faith, but the forum may also provide an opportunity to demonstrate community inclusion. Ernesto might consider working with the PAPS group to find the middle ground. The moment of silence can be a positive road to take if it does not preclude the option to use it for a non-disruptive prayer. As for the school board, Ernesto should not give away the right it already has to open its meetings with prayer (as long as the school is not in the Sixth Circuit).

Religion as Curriculum

Joan and Bob Arlington are the parents of a 3rd grader and a 5th grader at Thornton Elementary School. As they enter the classroom of teacher Sally Lo for their scheduled meeting, Sally observes that the Arlingtons seem very tense and upset. Before she can properly greet the couple, Bob Arlington points his finger at her and states in a loud voice, "How can you, a respected teacher, contribute to Thornton Elementary School becoming a place where children are brainwashed by religious zealots?"

Sally is taken aback by the statement, but keeps her composure and says, "Since this is news to me, please tell me what you are talking about. I need more information to understand your concern."

Joan reminds Sally that their son and the other students in Sally's 3rd grade classroom are studying America's colonial period. As a part of that unit, Sally is requiring the students to read about and discuss the Puritans in the Massachusetts Bay Colony. In Joan's view, "a student cannot study the Puritans without talking about their religious beliefs, and that is a violation of the law."

Bob tells Sally that their daughter and her 5th grade classmates are studying and discussing ancient Greece. As a part of that unit, the teacher is requiring all students to read selected Greek myths and to memorize the names and importance of several Greek gods. In Bob's opinion, "this is teaching religion in a public school and the law clearly forbids it. Joan and I are upset. The First Amendment is being violated by you and by your

colleague, right under the principal's nose, and we want it to stop immediately!"

Sally leans back in her chair and begins to mentally compose a response.

Background Discussion: Religion in the School Curriculum

The term *curriculum* is not easy to define. One accepted definition describes curriculum as the aggregate of courses offered. Using this definition, curriculum can be limited to the body of official courses taken by students (English, mathematics, science, social studies, and so on). A broader definition of the term describes curriculum as all courses and activities offered under the official sanction and control of the school system. Those who adopt this definition include everything from the school newspaper, to a minute of silence observed at the beginning of the school day, to the Pledge of Allegiance, to field trips, to interscholastic athletics and clubs, along with credit courses.

The term *religion* is equally hard to define and is subject to individual interpretation. Is religion present in a public school when individual students say a silent prayer at lunch in the school cafeteria, or prior to an examination in a classroom? Is religion present when a high school senior gives an invocation at graduation? Is religion present when students silently gather around the school building flagpole prior to the start of school? Is religion present in a required minute of silence at the beginning of the school day? Is religion present in a classroom where the students and their teacher are discussing the early civilizations of the western world? Is religion present during show-and-tell time when a 2nd grade student displays a copy of the family Bible to his or her classmates? Is religion present when drug and alcohol use and abuse are discussed in a health education class? Is religion present when school systems conduct assembly programs intended to teach values to students? Is there a clear affirmative response to all or some of these questions, or does each response depend on other factors?

Suffice it to say that the lack of agreed upon definitions for

both *curriculum* and *religion* often produce constitutional and legal issues for the courts to resolve. Public school boards, administrators, and classroom teachers must exercise caution when dealing with matters where both concepts are present and intermingled.

Legal Considerations

The First Amendment to the U.S. Constitution states, in relevant part, "Congress shall make no law respecting the establishment of religion, nor prohibiting the free exercise thereof. . . ." The Fourteenth Amendment made these rights applicable to the states, and state government and state governmental agents (e.g., state boards of education, local public school boards as state actors) must therefore remain neutral and exercise restraint in matters of religion in the school program (*Engel v. Vitale*, 1962; *School Dist. of Abington Township v. Schempp*, 1963).

The application of the Tenth Amendment to the U.S. Constitution places legal authority over public education in the hands of the states. It therefore follows that the power of each state to prescribe a general curriculum for all the educational institutions it supports is a clear extension of this authority. It also follows that state education officials have the legal prerogative to make reasonable regulations to carry out the state's general curriculum and scholastic requests. However, as the U.S. Supreme Court has ruled, neither state boards nor local boards are free, in the name of curriculum policy and regulation, to violate the individual rights of citizens (*Meyer v. Nebraska*, 1923; *West Virginia State Board v. Barnette*, 1943).

The Fourteenth Amendment to the U.S. Constitution guarantees, in part, that no state "shall deprive any person of life, liberty or property without due process of law." On this point, the Supreme Court has held that parents have a liberty interest in directing the educational development of their children (*Pierce v. Society of Sisters*, 1925; *Wisconsin v. Yoder*, 1972). Similarly, the Court has opined that the right of teachers to practice the profession of teaching is a liberty interest protected by the Fourteenth Amendment (*Meyer v. Nebraska*, 1923). In these early

decisions, the Court struck a balance between the power of education officials to control the curriculum and the constitutional and legal rights of students, parents, and teachers.

Federal Law

Although there are no federal statutes mandating a national curriculum, a religion/curriculum-related issue might indirectly involve a student's, parent's, or employee's rights under an existing federal statute dealing with federally assisted programs. For example, a classroom teacher might claim that she was denied inclusion in team teaching a high school course in comparative religions solely because of her religion. Here she might cite the protections of the Civil Rights Act of 1964.

Similarly, students might claim a violation of the Federal Equal Access Act for denial of access to educational benefits where the school principal has denied permission to include their club in the school's official club period solely because of the group's religious focus. In this situation, a determination of the club's curricular or non-curricular status is crucial.

State Law

As a general rule, the public school curriculum is a matter of state law. What is or is not required in public school (elementary, middle, or secondary) must be in some way tied to the constitution, laws, and official policies of a state. A quick glance at the typical state school code will reveal the presence of such items as the number of days when school must be in session; a list of required courses in every elementary school; the inclusion of physical education and health education in a secondary school; a system for testing a student's knowledge of a specific subject studied in school; and a list of holidays for which public schools will be closed. When pondering constitutional and legal issues involving religion in the curriculum, one must research and apply state law.

Case Law Examples

Sweezy v. New Hampshire (1957). The Court ruled that state laws that cast a pall of orthodoxy over the classroom would not

be tolerated. Teachers and students must always remain free to inquire, study, and evaluate.

School Dist. of Abington Township v. Schempp (1963). In the opinion of the Supreme Court, when the Bible and religion are talked about and objectively presented to students as a part of a secular lesson, the First Amendment is not offended.

Epperson v. State (1968). In this religion/curriculum-related decision, the Supreme Court struck down a state statute forbidding the teaching of the theory of evolution in the public schools. In the Court's opinion, the First Amendment must be applied to safeguard the fundamental values of speech, inquiry, and belief.

Smith v. Smith (1975). In this case, some parents objected to their children being exposed to certain elementary school textbooks. In their view, the material in these books offended their religious beliefs and discouraged Christian principles and good citizenship. The court conceded that the books might contain some material offensive to the parents' religious beliefs, but nonetheless held that the school board had not abused its authority in selecting the books.

Stone v. Graham (1980). The Supreme Court struck down a state law that permitted the posting of the Ten Commandments in public schools. The Court made it clear, however, that the Ten Commandments would pass constitutional muster if integrated into the school curriculum as a part of a secular "study of history, civilization, ethics, or comparative religions."

Palmer v. Board of Education (1980). In a case involving a teacher who refused to carry out certain aspects of the school's curriculum because of her religious beliefs, the Court ruled against the teacher. Education cannot be left to individual teachers to teach the way they please. A teacher has no constitutional right to require students to submit to his or her religiously motivated views and to thereby forgo a portion of the education to which they, the students, are entitled.

Mozert v. Hawkins County Public Schools (1987). Parents challenged the stories read by their elementary school children, arguing that the stories offended their religious beliefs. The court ruled against the parents. The court stated that although the ideas presented in the readings might expose students to

objectionable ideas, there was no evidence that the students were being inculcated with those ideas by their teachers.

Edwards v. Aguillar (1987). A state law requiring that creation science be taught in public schools where evolution is taught was struck down. The Court reasoned that the state law was written to advance religion, thus violating the First Amendment's separation of church and state.

Peloza v. Capistrano (1995). Public school officials have a right to prevent classroom teachers from giving students and others the impression that the school system prefers a particular religion or religion in general.

Marchi v. B.O.C.E.S. of Albany (1999). A special education teacher was suspended from his job because he refused to obey a directive to stop using religious themes and materials with his students. The court opined that a school board has a legitimate interest in restricting an employee's classroom performance in an effort to avoid a potential Establishment Clause problem.

DiBari v. Bedford Central School District (2001). Plaintiff parents, who were Roman Catholic, filed suit against the school system, claiming that their children were being exposed to several activities and teaching methods that they, the parents, found objectionable on religious grounds. Ultimately, the parents did not prevail in their suit. To succeed in such a case the parents must be able to show that there was an intent on the part of school officials to establish or endorse a religion, that the students were in some way coerced by their teachers, and that student attendance during the episode was not voluntary.

Doe v. Porter (2002). A "Bible ministry" program conducted in public elementary schools by an outside school group violates the Establishment Clause of the First Amendment. The voluntary nature of the program and the fact that the school board and school principals are not officially involved do not alter the program's inability to pass constitutional muster.

Policy Considerations

It is extremely important that issues of religion in the curriculum be placed within a context of local school board policy. Consider

the following questions regarding local school board policy on this issue:

- Does the school board have clear policy statements specifically referencing school curriculum?
- How do the policies define and limit or broaden the term *curriculum*?
- Do the policies differentiate between curriculum and such terms as *extracurricular* and *co-curricular*?
- Do the policies make it clear that the school board maintains complete control over all matters of school curriculum?
- Do the policies contain specific directives regarding the prerogatives of principals, as instructional leaders of their schools, in terms of curriculum planning, course content, textbook selection, student testing, and other such matters?
- What about the professional prerogatives of classroom teachers in such matters as course content, student readings, teacher-made tests, grading and evaluation of student class work, and the selection of books and other instructional materials?
- Do the policies forbid teaching religion to students (including teaching and discussing personal beliefs and recruiting students for religious organizations), whether or not students earn credit for their efforts?
- Do the policies allow teaching about religion(s) as a part of a bona fide secular course unit of study?
- Do the policies specifically cover the use of the Bible, the Koran, or any other religiously significant document or resource as a part of any school-sponsored class or activity?
- Do the policies cover the wearing of religious garb or symbols by teachers when teaching their classes?
- Do the policies reference the involvement of members of the clergy in classes or other school-sponsored activities?
- Do the policies contain penalties for administrators and other employees who violate the above policy directives?
- Do the policies address parental involvement in curricular matters?
- Do the policies contain possible "opt-out" or "opt-in" provisions for students and parents in matters of curriculum?
- Do the policies contain an appeals process for parents and other community members who object to curriculum content

and or teaching methods, assignments, textbooks, and instructional materials?

Practical Considerations

Even though the Arlingtons are clearly upset, Sally must maintain a professional demeanor and keep her emotional composure. As the classroom teacher, Sally must remind herself that she is the professional and this is her classroom. The parents are the visitors coming into the situation. Also, she must presume that the Arlingtons have their children's best interests in mind and realize that they believe they are accurate in their perceptions of what is going on in their children's classrooms.

The first thing that Sally must do is calm the Arlingtons and make them feel welcome in her classroom. Next, she should let them know how much she appreciates their interest and involvement as parents. She must make it clear that she is ready and willing to answer all of their questions.

Sally should make available her lesson plans regarding the study of the Puritans in the Massachusetts Bay Colony, along with the course materials and readings. She should explain the purposes and objectives of her lessons, student activities, and reading assignments. Most important, Sally must emphasize how each reading, class discussion, and student activity relates to the historical and cultural aspects of the study of the Massachusetts Bay Colony and its inhabitants. In other words, she must demonstrate that her purpose is neither the teaching of religion nor religious indoctrination of her students.

In addition, Sally must tell the Arlingtons that she cannot respond to their concerns about any other teacher. However, she should encourage them to have a similar conversation with their elder child's 5th grade teacher regarding his or her ancient Greece unit.

Sally should remind the Arlingtons that the school board decides what is or is not covered in the curriculum. She should also inform them that the school system has a brochure outlining an appeals process covering curricular concerns, a copy of which is available in the principal's office. She should encourage

them to take advantage of that process if they are not satisfied with their conversation with her.

Finally, Sally should document the meeting. She should record the day of the week, date, location, and time of the meeting; who was present at the meeting; what she presented to and shared with the parents; a list of any suggestions made to the parents; and a brief summary of her perceptions about any conclusions reached regarding the parents' concerns. This documentation should be dated, initialed, and kept in her file.

Postscript

Sally Lo confronted parents who are not atypical. The Arlingtons approached her with the allegation that she is illegally teaching religion in school. In this case, Sally's succinct response is that she is teaching the curriculum that was approved by the school board. Provided they are not abusive, it is good for her to hear the Arlingtons' concerns; however, if they continue to use the tone and accusatory language with which they started the conversation, she should refer them to the principal and ask them to leave. There is a significant difference between teaching religion and teaching about religion in a historical context. The objection of two parents should not change the curriculum or the teaching strategies of an effective teacher.

Holidays

Practical Scenario

Claudia Jones, the new principal at Randville Elementary School, is holding her first meeting of the administrative team. The first item on the agenda deals with the school calendar. Assistant principal Janine Polanski has been given the responsibility of gathering all of the information needed to plan the school calendar for the coming year and presenting her recommendations to the administrative team.

In the course of carrying out this responsibility, Janine has examined the issue of official and unofficial school holidays and celebrations. She begins her presentation by suggesting that the school calendar be changed. More specifically, she suggests that (1) the school calendar only include the names and dates of official state holidays (Labor Day, Election Day, Veterans Day, Thanksgiving, Presidents Day, and the like), (2) no religious holidays, whatever the religious significance, be specifically mentioned, but rather that they be subsumed under such titles as "Winter Break" and "Spring Break," (3) no unofficial holidays be mentioned (especially Halloween and Valentine's Day), and (4) no celebrations, including student birthdays, be allowed on school property, especially in classrooms, because of the valuable instruction time lost.

Following Janine's report, three of the five members of the administrative team express their lack of support for her recommendations. In their view, many parents and others in the community will be upset with a school calendar like the one proposed by Janine. The three team members recommend to Claudia that the school calendar remain as it has been for the last 40 years, with Halloween, Thanksgiving, Christmas, Valentine's Day, St. Patrick's Day, and Easter highlighted and celebrated. They also note that elementary school students look forward to birthday celebrations in their classrooms, and their parents are more than willing to volunteer their time to bake cakes and decorate classrooms.

The administrative team now turns to Claudia for her input. Should she accept Janine's recommendations as stated, reject them, or consider a compromise?

Background Discussion: School Holidays and Celebrations

Early on in the history of the U.S. public school system, major school holidays (including in-school celebrations and official school closings) were, as a general rule, coterminous with the official holiday periods of the country's major religions, Christmas and Easter being prime examples. Celebrations took

place in the school auditorium and classrooms at Thanksgiving, Halloween, and Valentine's Day, and elementary school students celebrated each other's birthdays with classroom parties. In the 1960s, however, these practices began to change because of a line of decisions handed down by the U.S. Supreme Court involving First Amendment religion issues, and a growing number of protests, mostly citing religious reasons, from both parents and students. Public school systems across the country began to "secularize" the school calendar and to eliminate most in-school celebrations, including those not necessarily religious in nature.

Legal Considerations

Made applicable to the states by the Fourteenth Amendment, the First Amendment to the U.S. Constitution states, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." With this in mind, the U.S. Supreme Court has made it clear that public school systems must assume a neutral position in matters of religious practices and exercises (*Engel v. Vitale*, 1962; *School District of Abington Township v. Schempp*, 1963). One year after the *Schempp* decision, a case dealing with several issues involving religion in public schools came before the Court. Though it ruled that devotional Bible reading and the recitation of prayers were unconstitutional, the Court left many questions unanswered, since it did not address other issues brought up by the case, such as in-school celebrations and students singing religious songs (*Chamberlin v. Dade County Board*, 1964).

In the period between 1969 and 1990, the Supreme Court made it clear that students do not shed their First Amendment right to freedom of expression at the public schoolhouse door. Beginning with *Tinker v. Des Moines* (1969), the Court declared that absent "material and substantial disruption," students may express themselves.

In addition, the Supreme Court has consistently reminded school officials of the need to remain "viewpoint neutral" regarding religiously oriented student expression. However, the Court

has also made it clear that students do not have a right to use "lewd," "indecent," or "vulgar" language in public schools (*Bethel School District v. Fraser*, 1986). Similarly, in 1988, the Court declared that school officials have the right to forbid the publication in a school newspaper of material that is deemed inappropriate, so long as that determination is made for "pedagogical reasons." "Educators," said the Court, "do not offend the First Amendment by exercising . . . control over the style and content of student speech in school-sponsored expressive activities" (*Hazelwood v. Kuhlmeier*, 1988).

In 1990, the Supreme Court applied the Equal Access Act (1984) and held that student-initiated, non-curricular clubs shall not be denied equal access to a school's forum solely because of religious, political, or philosophical reasons (*Board of Education v. Mergens*, 1990). Thus, student-initiated exercises of religiously motivated expression (i.e., religion as a form of speech) were given constitutional protection under the First Amendment's free exercise clause. Public school officials have been cautioned, however, not to let the accommodation of student-led religiously motivated exercises give the impression of official school system endorsement (*Santa Fe I.S.D. v. Doe*, 2000).

Federal Law

In addition to potential constitutional issues, shown above, holiday and other celebrations held in public schools might also involve the application of federal statutes, such as the Equal Access Act. Could the elimination of all holiday celebrations bring a reverse set of complaints? For example, though not involving student clubs per se, could either a parent or student successfully argue that willing students should be allowed to gather together as a group, in school, during the school day, at Christmas time, to celebrate—that is, express—their joy, and at the same time study and learn about the religious holidays of fellow students of other faiths? Other parents might make the same claim regarding Hanukkah. Might they argue that they are being deprived of their right to meet, celebrate, and learn solely because of their religious beliefs?

State Law

As a general rule, state law contains a set of official holidays when all public buildings are closed and when governmental employees are excused from work. Many of these holidays, though not all, correspond with significant events on the calendars of dominant religious groups (e.g., Good Friday). Thus, local public school systems are bound to honor and include the same days in their calendar. As a matter of law, the fact that a holiday is included in the school calendar and bears the same name as a recognized religious holiday does not mean that the school system is endorsing a religion. For example, the attorney general of Virginia found, in an official opinion, that the mere reference in a public school system calendar to the mid-year break as "Christmas Break" does not render it offensive to the First Amendment ("Opinions," 1995).

Case Law Examples

Lemon v. Kurtzman (1971). In an effort to determine whether or not a school holiday or other celebration passes muster under a First Amendment Establishment Clause analysis, the following three questions must be asked: (1) Does the inclusion of the holiday or specific celebration have a clearly secular purpose? (2) Does inclusion of the holiday or the celebration either advance or inhibit the free exercise of religion? (3) Does inclusion of the holiday or the celebration excessively entangle school and religion?

Florey v. Sioux Falls School District (1980). The Eighth Circuit Court did not find in violation of the Establishment Clause the policy and practice of public school classes observing Christmas and students singing carols, because the court's majority saw the purpose of the activities as primarily cultural and historical rather than primarily religious.

Mozert v. Hawkins County Board of Education (1987). In a decision involving a parental challenge, on religious grounds, to books being read by the parents' elementary school children, the court made it clear that accommodation of parental objections to school activities can go only so far. The notion of an "opt-out" choice for parents was considered a reasonable alternative.

Clever v. Cherry Hill Board of Education (1993). A federal district court reached the conclusion that simply including Christmas and Hanukkah on the official school system calendar did not offend the First Amendment.

Sechler v. State College Area School District (2000). A local church pastor unsuccessfully challenged a holiday display and song program at an elementary school. He said that school officials were "hostile" toward the Christian religion. The court found no preference in either the program or celebration for any particular religion and that the program's clear intent was "to convey an inclusive message of celebration of the season."

Policy Considerations

References to specific holidays on a school system calendar and holiday celebrations being allowed to take place in school buildings or on school property are matters of local school board policy. Consider the following key questions when dealing with issues of this nature:

- Does the local school board have a clear policy addressing official school closings on specific holidays?
- Are the holidays named?
- Are the names of the school holidays listed in the official school calendar the same as those listed in state statutes (e.g., Presidents Day, Labor Day, Election Day, Thanksgiving Day, and so on)?
- Are other holidays (e.g., Halloween, Valentine's Day) referenced in policy as either allowed or forbidden?
- Does the policy use secular terms for major vacation breaks (e.g., Winter Break and Spring Break) rather than such traditional terms as Christmas Break and Easter Break?
- Does the policy give discretion to individual principals regarding holiday celebrations, or does it ban any type of holiday celebration in school buildings, in classrooms, and on school property?
- Where discretion is given, does the policy make it clear that all celebrations and holiday programs (including choral performances and school assemblies) shall be secular and not religious?

• Does the policy specifically direct classroom teachers to refrain from holding classroom celebrations of any kind, including student birthday parties, unless permitted by their school's principal?

• Where in-school celebrations of any kind are permitted, does the policy make it clear that classroom teachers (including choral directors, drama coaches, and others) are responsible for ensuring that such activities are pedagogically sound and secular in nature?

• Does the policy contain an "opt-out" or "opt-in" provision for parents of students and/or students themselves who may object to participating in specific holiday celebrations, school programs, or any other type of school system, school building, or teacher-initiated activity?

Practical Considerations

As a new principal, Claudia must move cautiously. The fact that she assigned her assistant principal the task of gathering information concerning holidays and the school calendar and required that a report with accompanying recommendations be made to the administrative team is important. She must neither avoid nor diminish the importance of that report and the resulting recommendations.

Claudia must keep in mind that some holidays, celebrations, and school closings are required by state law, and therefore cannot be changed by her team. Similarly, some holidays and celebrations are included in the school calendar because of the policies of the local school board. With the latter, her team likely will need to make recommendations for change through administrative channels to the school board.

As a first step, Claudia should engage her administrative team in a complete discussion of Janine's report and recommendations. She must make a good faith effort to hear all the pros and cons and to facilitate consensus on the issues.

Next, Claudia will want to establish and appoint a committee to gather information from a wider and more diverse audience. She will need to make it clear that the committee—the members

of which will be solicited by Claudia based on a variety of recommendations—will represent teachers, parents, and community residents. The committee's sole charge will be to survey attitudes regarding holiday celebrations by students, including birthday celebrations in classrooms, and to make specific recommendations to Claudia for consideration by her administrative team. The team will need to evaluate its consensus recommendations alongside the recommendations of the committee.

Finally, Claudia should put together a complete report, including recommendations for changes to the school calendar (holiday and birthday celebrations must be a part of a list of all recommended changes). The report must include a description of the process followed, highlighting the representative committee's involvement. The final report and recommendations should be sent through administrative channels to the school board for its consideration and possible action.

Postscript

Principal Claudia Jones has been confronted by a dilemma over how holidays should be recognized on the school calendar. She has also been presented with a proposal to eliminate classroom birthday parties for students.

Although the law clearly prohibits the endorsement of a religion in a public context, it does not prohibit the recognition of religious holidays on a school calendar. In reality, to avoid using the words Christmas or Hanukkah simply because they are religious terms may imply to students that schools are, on some level, ignoring reality. Wearing religious symbols, painting religious scenes, or writing about religious topics is not prohibited in any legal context. The prohibition, and rightfully so, applies to an endorsement.

As for birthday parties in the classroom, Claudia must reconcile the school's established social practices with the need for instructional time demanded by an environment that must take into account high-stakes assessment and state-mandated consequences. If the school board has a policy on the issue, then her decision is clear. In practical terms, Claudia should work with

the leadership of the parent associations and the faculty to find a way to both protect instructional time in the classroom and highlight special times for celebration and recognition.

Chapter 5

Free Speech and Expression

School Board Meetings

Apple Valley's five-member board of education values its positive reputation in the community. The board takes pride in the fact that in the past decade, no single issue has ever prevented the members from reaching consensus. Further, this atmosphere of cooperation has prevailed even though the board's membership has changed several times.

In November 2002, the citizens in the Blossom district of Apple Valley elect Dean O'Conner to the school board. As a former public school teacher, principal, and superintendent of schools in another school district, Dean looks forward to his new challenge as a school board member. In preparation for the first official school board meeting, he meets privately with the board's most senior member and current chair, Edward Mooney. Dean wants to know what to expect and what is expected of him as a new board member.

Ed, a retired military officer and owner of E.A. Mooney and Associates, Certified Public Accountants, has the reputation among his colleagues of running a tight ship, managing a "rocket docket," and never allowing any deviation from the board's official agenda. Ed is "all business." His advice to Dean is straightforward: "Always keep in mind that we, as a board of education, are a governmental body elected to serve the people of this

community. The citizens of Apple Valley expect that we will keep the best interests of their children as our top priority, will spend taxpayer money in a wise and prudent manner, and will be accountable if the education of our children suffers. The community expects that I will run all board meetings on a very tight schedule with a limited agenda. The community does not want us to waste valuable time discussing trivial and meaningless matters. I will tolerate no criticism of either board members or school system personnel. No profanity is to be uttered. Every person who desires to speak at a board meeting must register and be approved by me. I must approve all items of discussion before they are added to the board's agenda. Dean, as a new board member, I expect that you will keep these things in mind."

As Dean leaves Ed's office, he is troubled by what he has heard. Can meetings of a local school board be so controlled by the chair? Beyond setting the time, place, and manner of an official meeting, can a local school board set restrictions on the selection of speakers, the relevance of subjects to be discussed, and the content of discussions?

Two days later, Dean receives a letter from Janet Thomas. Janet is a parent of three children in the Apple Valley School District, and the newly elected head of Parents Dedicated to Quality Instruction and Accountability (PDQIA). Janet's letter informs Dean that several members of PDQIA plan to attend next month's school board meeting to "air documented concerns about the lack of qualified teachers in Apple Valley classrooms." At the conclusion of her lengthy letter, Janet states, "We are passionate about our children's education, and we plan to speak to the school board, whether or not we are formally recognized and allowed to do so by the board chair."

Given his recent conversation with Ed Mooney, what should Dean do?

Background Discussion: Local School Board Meetings

Deeply rooted in the history of American public education and based upon a tradition of local control, the legal status of and

authority held by contemporary local public school boards of education are clear. Although the general supervising authority over public education in a state rests with the legislative body of that state, the specific authority to supervise the schools in a local school district belongs to a local board of education, that is, the school board.

Public school boards are public governmental entities, established by state constitutional mandate or by state legislature. School boards enact and make policies and regulations to implement one aspect of the public's business, namely, providing educational opportunities for all school-aged children in a specific community.

Local boards of education officially function as a corporate entity. The board as a body, and not its individual members, possesses the legal authority to act. Moreover, where any legal immunities exist (sovereign immunity under state law and Eleventh Amendment immunity under federal law), these immunities are available to the board for its official actions and not to the individual board members.

Local boards of education possess only those powers granted by, or necessarily implied by, state laws. Most of the official acts of local school boards are discretionary in nature; personnel decisions, selecting school sites, setting student attendance zones, curricular changes, and expenditure of funds are all discretionary functions. Local boards also carry out ministerial acts such as preparing official reports for dissemination to the public. Generally, courts of law will get involved in school board decision making where it is demonstrated that the board acted unlawfully, arbitrarily, capriciously, or beyond the scope of its authority, or abused its discretion.

Local school boards must conform to the requirements of state statutory law, such as those regarding the mandatory number of board meetings in a year, days when board meetings must be held, or the number of members needed to establish a quorum, as well as those governing conflicts of interest. The actual rules and procedures for conducting the board's business (e.g., voting procedures, receiving public comment at board meetings, setting the meeting agenda, allowing or prohibiting

cameras and taping at board meetings, and others) are set by the board itself.

Because school boards are public bodies carrying out the public's business, official school board meetings are public meetings. During official meetings, the school board's record of official actions, including the voting record, is a public record. With the exception of executive and/or special sessions of the board (as specified in the statutes of a state), school board meetings must be publicly announced—including the day, time, and place of the meeting—and attendance at official board meetings must be open to the public.

Legal Considerations

The Tenth Amendment to the U.S. Constitution states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The absence of specific language in the U.S. Constitution regarding education and schools, coupled with the language of the Tenth Amendment, has been interpreted to grant the legal authority to establish and maintain an educational system to each state.

State government itself does not directly operate schools and deal with their day-to-day functions. With the exception of various state schools for the visually impaired, schools in correctional institutions, or governor's schools for the arts, public schools are operated locally. Although some states might have intermediate units functioning between the state and local levels (e.g., New York State B.O.C.E.S. and Pennsylvania Intermediate Units), as a matter of law, the authority to operate and supervise public schools rests at the local level (*Hortonville Joint School District v. Hortonville Education Association*, 1976).

To provide public education opportunities in localities, states (other than Hawaii) divide themselves into local school districts and delegate the legal authority to local boards of education—the "school board"—to establish, supervise, and control the public schools in that subdivision of the state. As the policy-making body of the school district, a local school board must not

ignore, evade, or violate its own policy or procedure (*Board of Education v. Pico*, 1982).

As an assembly of people gathered together for the purpose of deliberating and discussing matters of public concern, school board meetings can be considered a kind of forum. Basically, there are three types of forum: the open public forum, the limited or special purpose forum, and the closed non-public forum. As its name indicates, in an open public forum, wherever it might be, those present openly discuss, debate, argue, and otherwise exchange opinions on all types of matters of public concern, with few restrictions placed on the manner of discourse. In a limited or special purpose forum, the discussion, debate, and exchange of ideas and opinions is focused on a particular set or type of matter. The restrictions placed on those present are intended to keep the participants focused. A closed forum is one not open to the public. In this context, the discussions and deliberations of a public body are closed because of the sensitive nature of the matter under consideration. Official meetings of local boards of education are not open public forums; rather, they are limited or special purpose forums, that is, the discussions, debates, deliberations, and other exchanges of ideas are limited and otherwise restricted to the sole business of the board, namely, public education in that particular school district. There are times, however, when the board must go into executive session (i.e., behind closed doors). For example, a discussion of the possible dismissal of a school principal or teacher would take place in executive session. These sessions are classified as closed forums.

Because a local board of education has a narrow and limited purpose, all matters brought before that body in an official meeting must be related to that purpose (education). The school board has the legal prerogative to set the meeting agenda and to keep the discussions and deliberations focused on the agenda items. The following are content-based restrictions a school board might choose to enforce:

- Criticism of school personnel. Although it is likely inevitable that some attendees at open school board meetings will wish to use the meeting's public comment period as a forum to

vent their frustrations involving an identifiable individual (e.g., a school principal, counselor, or teacher, or the school superintendent), boards can prevent overt episodes of "name calling." In an effort to maintain order, effectively move board meetings forward in a civil and positive direction, and preserve staff morale, the school board can generally set ground rules that discourage personal attacks and encourage candid discussions that focus on personnel as a whole.

• Selection of subject matter. All subjects included on the board's agenda and discussed during the public comment portion of the meeting, must be limited to matters directly affecting the education of students enrolled in the school district. The board may decide to supplement its agenda at the time of, or during, the board meeting.

• Selection of speakers. Even though a local school board is a public body, and parents and other community citizens have the legal right to attend regularly scheduled board meetings, the school board has the prerogative to decide who, among those who wish to address the board, can do so. Speakers can be asked to submit their names and reasons for requesting time to speak as a part of the meeting agenda. The board can set a time limit on all those given permission to speak.

• Profanity. In addition to forbidding the use of inflammatory language, the school board can forbid the use of vulgar, profane, and obscene language by all persons in attendance at school board meetings. Such restrictions are usually covered in the statutes of each state, as well as in local ordinances.

In an effort to move its meeting agenda forward in an effective and efficient manner, local school boards have the legal prerogative to (a) set time limits on the meeting itself, on the discussion of each specific item on the meeting agenda, and on all comments made by speakers; (b) prevent the discussion of repetitious and irrelevant subjects; and (c) take immediate steps to stop the introduction and discussion of disruptive subjects. As a general rule, the board chair is responsible for these matters.

Case Law Examples

Police Dept. of the City of Chicago v. Mosley (1972). Government does not have the power to restrict speech or expression in a public forum solely because of the message of that speech.

Grayned v. The City of Rockford (1972). Government may reasonably regulate the time, place, and manner of speech or expressive activities in a public forum, whatever the intended purpose of such activities.

Collinsville Community Unit School Dist. No. 10 v. White (1972). All official meetings at which the governing body of a school district takes any legal action shall be, with few exceptions, "public meetings."

Peters v. Bowman Public School Dist. No. 1 (1975). Where a local school board met in an executive session and voted not to renew a teacher's contract, and at a subsequent open meeting of the board affirmed that decision without discussion, the Court ruled that the dismissal decision was void because it was the product of an illegal meeting.

Widmar v. Vincent (1981). The Constitution forbids a state governmental entity from enforcing certain exclusions from a forum it creates, even if it was not required to create the forum in the first place.

Perry Education Association v. Perry Local Educators (1983). The unique environment of the public school is best characterized as a limited-purpose public forum, and not a traditional open public forum. As such, a school board is free from all unspecified uses, and regulations on access to the forum need only be reasonable and "viewpoint neutral." The nature, function, and past pattern and practice of using the forum must be evaluated before access is granted, denied, or withdrawn.

Shirley v. Beauregard Parish School Board (1993). Notice of a public meeting indicating that one item on the school board's agenda was to hear recommendations for an assistant principal position was sufficient to satisfy the state law's public notice requirement.

Bach v. School Board of the City of Virginia Beach (2001). A public school board's prohibition on "personal attacks" during public comment periods at school board meetings was held unconstitutional as a prior restraint of freedom of speech in a limited public forum.

Policy Considerations

Local school boards are governed by their own policies. Thus, to fully comprehend the operation of a local board and any procedural restrictions placed on the board one must examine the specific written policies of the board itself. Consider the following questions when examining school board policy:

- Does the school board have a policy regarding the scheduling and the place of official board meetings?
- What does the policy say about the frequency and number of such meetings?
- Does the policy set a particular day and time for official meetings?
- Is there a specific policy that treats the meeting agenda, including who has the prerogative to create the agenda (e.g., the board chair), the nature of items to be considered for inclusion on the agenda (e.g., matters directly related to the education of the children in the school district), and limitations on who can suggest items to be placed on the agenda (e.g., only school board members)?
- Does the board have a policy regarding the need for a quorum of board members present at official meetings? How is *quorum* defined?
- What is the board's policy regarding public comment at official school board meetings?
- What is the board's policy regarding proscribed speech at board meetings (e.g., no profanity or obscenities, no name calling or use of inflammatory language, no criticism of school personnel), both by board members and citizens appearing before the board?
- Does the school board have a policy concerning special, or closed/executive sessions? How are these defined?

• What is the board's policy regarding members of the board voting on official board actions?

Practical Considerations

As a new member of the school board, Dean O'Conner is wise to meet as soon as possible with the board chair for an orientation session. Dean needs to find out about the procedural aspects of board membership, as well as the expectations that will be placed upon him—especially during official board meetings. However, Dean must realize that the board chair is not the board. While Edward Mooney wields political power, he is nonetheless only one member of the board. As chair, he has the authority to control and keep civil the atmosphere of board meetings; basically, he has unbridled authority to function as a "gatekeeper." However, the sole legal authority to make decisions does not vest in the board chair.

As the elected representative of the residents of the Blossom district, Dean has a duty to represent the best interests of the children in that area of Apple Valley. The fact that Dean is a new member should not preclude him from bringing the issues, concerns, and wishes of his constituents before the board. As such, he cannot simply brush aside the request made by the Parents Dedicated to Quality Instruction and Accountability (PDQIA). To accommodate the group, Dean should contact Janet Thomas, PDQIA's chair, and make the following suggestions:

• Ask Janet to write a letter to Ed Mooney, telling him about her organization and formally requesting time on the board's agenda at next month's regularly scheduled meeting.

• Have Janet list in her letter the matters that her group wishes to discuss with the board.

• Encourage Janet to use positive, non-accusatory language in stating the group's concerns.

• As an alternative to placing her group's concerns on the formal agenda, have Janet request time to present them during the public comment period.

• Have Janet include in her letter her willingness to furnish information to the board prior to next month's meeting.

Dean must see to it that PDQIA is treated in the same manner as other groups who have made similar requests of the board.

Postscript

A school board meeting is, first and foremost, a public meeting. Freedom of information laws in most states push all but the most sensitive issues into the open. Although no group should be able to dominate or immobilize the work of the board, everyone should have an opportunity to speak. The chair, unlike elected mayors, is one vote on the board and is charged with maintaining the board's "rules of play." On the other hand, there comes a time when citizens who have brought issues before the board must accept that a decision has been made, regardless of whether on not they agree with that decision.

Student Dress

Howard Schmidt, the high school principal, is waiting for the buses to arrive one morning and thinking about the upcoming spring break. He is looking forward to a short family vacation followed by a few days while the students are away to catch up on some long overdue paperwork. As the last bus door opens, Patrick Boyle, an 11th grade gifted student, steps onto the pavement sporting blue and orange hair, presumably to show support for his favorite college basketball team. Howard quietly pulls Patrick aside and asks him to go rinse out the hair colors. As Patrick explains to the principal that his hair is colored for the big basketball tournament he's attending after school, he unbuttons his jacket, and Howard notices the young man is wearing a shirt with the words "Southern Pride" printed across the front and a Confederate flag on the pocket. "And turn that shirt inside out," the principal tells Patrick. "You know you can't wear that flag to school."

Howard genuinely likes Patrick, who has always been an excellent student, though a bit of a rebel. Not all of the school's officials share Howard's fondness for the teenager, however.

Many in the school system would like to see Patrick go, as he and his attorney father often test the limits of school policy. In fact, Patrick has been recommended for suspension twice for violations of the school discipline code. Both times, his father sued the board, which then reversed the suspensions.

"The hair color is permanent," Patrick informs Howard. "Won't go away until my hair grows." "Further," Patrick says, his debate club participation showing, "my dad said I have the First Amendment right to wear my hair any color I want because students don't shed their rights at the schoolhouse gate." Howard vaguely recalls this quote from a case he studied in education law while he was getting his Ph.D.

Howard asks Patrick to come into his office, and together they call Mr. Boyle. After Patrick relays what has happened, Mr. Boyle screams through the speakerphone, "Patrick, don't do anything until I get there. Dr. Schmidt, I'm going to call the newspapers, the Sons of the Confederate Veterans, and the television stations, and I'm going to sue you, the superintendent, and the school board. Have you all forgotten the First Amendment over there? And Patrick, you turn that shirt back right side out!"

As Howard calls the superintendent, he thinks, "There goes my quiet and restful spring break."

Legal Considerations

Federal Law

School boards often regulate student dress. Student dress codes may include anything from mandatory or voluntary uniforms to prohibitions against certain skirt lengths, obscene or profane language on clothing, symbolic clothing, gang clothing, body piercing, and tattoos. What the school can regulate and the degree of regulation are largely dependent on the school environment. When talking about student dress, the First Amendment is implicated because dress can be considered a form of speech or expression. Also, challenges to dress policies may be based on parents' right to decide what their children wear. In other words, parents sometimes claim a right to direct the

upbringing of their children. Students also can claim a privacy or personal liberty right to dress.

Although certain federal rights apply to student dress, those speech and privacy rights are not absolute. Schools have the power to regulate dress to maintain school safety and discipline, to promote an environment conducive to teaching and learning, and to teach community values. The courts continually struggle to strike a balance between student rights and the schools' need for order, discipline, and safety. The following cases have all addressed student dress issues, either directly or indirectly:

• *Tinker v. Des Moines Independent School District* (1969). The Supreme Court held that students could wear black arm bands in protest of the Vietnam War. The school policy preventing such garb was unconstitutional because the armbands did not create a "substantial disruption or material interference with school activities." Tinker is the leading case for student dress issues.

• *Bethel School District v. Fraser* (1986). Although not a dress case, this speech case is nonetheless relevant to the issue of student dress because the Supreme Court held that schools may categorically prohibit lewd, vulgar, or profane language on school property, a holding that would also apply to dress that includes such language.

• *Jeglin v. San Jacinto Unified School District* (1993). A policy prohibiting professional or college sports clothing was unconstitutional for elementary and middle school students but constitutional for high school students. The school was able to demonstrate a gang association affiliated with such sports clothing at the high school level. Further, the court held that the schools' ability to limit students' rights did not "demand a certainty that disruption will occur, but only the existence of facts which might reasonably lead school officials to forecast substantial disruption."

• *Harper v. Edgewood Board of Education* (1987). A student was prevented from attending the prom dressed in clothes of the opposite sex because schools have the right to teach community values and maintain discipline.

• *Boroff v. Van Wert City Board of Education* (2000). Schools can reasonably regulate offensive clothing.

• *Ferrell v. Dallas Independent School District* (1968). Prohibiting "Beatle-type" haircuts was constitutional because such styles might cause disruption in school.

• *Jackson v. Dorrier* (1970). The court upheld a prohibition against long hair for male students. It did not violate the First Amendment, due process, or equal protection rights because the hair length policy had a reasonable connection to school operations and maintaining discipline.

• *Richards v. Thurston* (1970). The court struck down an anti-long hair policy stating, "We see no reason why decency, decorum, or good conduct requires a boy to wear his hair short. . . . Certainly eccentric hair styling is no longer a reliable signal of perverse behavior." The court further held that the right to select and wear a certain hair length is a protected privacy or liberty interest.

• *Bishop v. Colaw* (1971). A hair length policy violated the due process right to govern one's own appearance. The court determined that possible school disruption was not sufficient to yield the due process right.

• *Massie v. Henry* (1972). The court invalidated a short hair policy for male students. Interestingly, in finding for the students, the court stated, "Although there exists no depiction of Jesus Christ, either reputedly or historically accurate, he has always been shown with hair at least the length of that of [the students]. . . ." The court also noted that other historical figures, such as Generals Grant and Lee, wore long hair.

• *Vines v. Board of Education of Zion School District No. 6* (2002). A dress code requiring all black and/or white clothing and prohibiting logos, patches, imprinted words, designs, or slogans was upheld. The school board passed the policy to "create a school environment that fosters the academic and social growth of students." The court held that the dress policy was reasonably related to legitimate pedagogical concerns and therefore did not violate the First Amendment. Moreover, the parents' claim that the dress code interfered with their right to raise their children was dismissed because the policy was rationally related to the board's legitimate goal of improving safety and education.

• *Olesen v. Board of Education of School District No. 228*

(1987). A dress code primarily aimed at eliminating gang behavior prohibited earrings for male students, but not female students. The court found that such a policy did not violate the students' right to equal protection because the gender-based classification was substantially related to a legitimate government objective, namely, school safety.

• *Littlefield et al. v. Forney Independent School District et al.* (2001). Parents and students claimed the school uniform policy violated the First Amendment free expression and free exercise clauses, as well as the parental right to direct the upbringing of their children. The court held that the students' First Amendment rights are balanced against the schools' interest in promoting education. Moreover, although parents have the right to direct the upbringing of their children, these rights are not absolute in schools and are subject to reasonable regulation. The court also held that the school policy followed state law and had an appropriate religious opt-out provision to identify sincere and insincere beliefs.

• *Sypniewski v. Warren Hills Regional Board of Education* (2002). The school's racial harassment policy prohibited the wearing of symbols implying racial hatred or prejudice. The student was suspended under this policy for wearing a Jeff Foxworthy T-shirt that made fun of "rednecks." The court held that the school failed to show a concrete basis for a fear of genuine disruption "in the form of substantially interfering with school operation or with the rights of others."

State Law

Certain state laws may address how schools can regulate dress. Moreover, some state constitutions may confer greater rights to students and parents than the federal law provides. Consider the following statutory and case law examples:

• Wisconsin Code § 118.035(2). "A school board may adopt a policy that requires all pupils enrolled in school . . . or all pupils enrolled in one or more schools . . . to wear a uniform while in school or while under the supervision of a school authority."

• Virginia Code § 22.1-79.2. This statute enables local school boards to require students to wear uniforms. However, such poli-

cies must be consistent with the State Board of Education model guidelines, which must (1) include provisions for parental and community involvement, (2) address state and federal constitutional concerns, and (3) address the ability to pay for uniforms.

• California Code § 35183. After making a series of declarations regarding the relationship of dress to school safety and performance, the California legislature permits school boards to adopt "a reasonable dress code policy that requires pupils to wear a schoolwide uniform or prohibits pupils from wearing 'gang-related apparel.'" One example of the express public policy behind this statute is as follows:

> To control the environment in public schools, to facilitate and maintain an effective learning environment, and to keep the focus of the classroom on learning and not personal safety, schools need the authorization to implement uniform clothing requirements for our public school children.

• Arizona Code § 15-342. This statute grants school boards the discretionary power to require students to wear uniforms.

• *Pat Doe v. John Yunits, et al.* (2001). A school was ordered to let a male student wear female clothing to school. The legal claims under state law included the right to freedom of expression and to personal dress and appearance. The judge wrote that "[the school does not] find plaintiff's clothing distracting per se, but, essentially, distracting simply because the plaintiff is a biological male."

• *Board of Trustees of Bastrop Independent School District v. Toungate* (1997). A student challenged a hair length policy that applied to male, but not female, students. The challenge was based on a state anti-discrimination statute. The court held that "constitutional challenges to hair length policies . . . do not manifest such an affront to a student's constitutional rights as to merit our intervention." Although the court recognized that long hair on males is socially acceptable, it held that such a policy does not "deprive male students of an equal opportunity to receive an education or to participate in school functions."

• *Phoenix Elementary School District No. 1 v. Green* (1997). A challenge to the school's uniform policy failed. The court held that "the . . . content neutral dress code constitutionally reg-

ulates the students' First Amendment rights in the nonpublic forum of their school. It regulates a method, not a message, and is reasonable in view of the pedagogical mission of the Academy."

Policy and Practical Considerations

A carefully crafted dress code policy is the key to unchallenged implementation. Below are suggestions for such a policy:

- Check state laws and constitutions.
- Check current local school board policy on student dress.
- Identify problem areas for your school division or particular schools within the division. For example, do racial tensions exist to the point that wearing Confederate flag or Malcolm X apparel would be disruptive? Does hostility exist around issues of sexual preference such that wearing a "gay pride" or "straight pride" shirt would be disruptive?
- Evaluate actual, material disruption versus potential disruption for the particular school or school district.
- Identify community values to regulate what is "plainly" offensive.
- Know your local courts' opinions of dress issues. As demonstrated in the case examples above, courts differ on the effect of dress code policies on student and parent rights. Knowing the law specific to a jurisdiction increases the likelihood of regulating dress properly.
- Hold town or public meetings to gain insight into the views of the community on student dress.
- Survey the students, staff, community, local businesses, parents, colleges, and law enforcement to assist in developing appropriate and acceptable dress codes.
- Meet with law enforcement regularly and periodically to identify changing gang affiliated apparel.
- Increasingly, schools are facing gang, transgender, and sexual preference issues. Some examples include wearing clothing more typical of the opposite sex to school or wearing "straight pride" or "gay pride" message clothing. Be proactive and start talking about how to deal with such issues now.

Postscript

Generally, schools have the legal authority to regulate student dress that is plainly offensive, materially disruptive, or interferes with the rights of others (*Tinker, Fraser, and Chandler v. McMinnville School Dist.*, 1992). In fact, schools do not have to wait for actual disruption, but may regulate dress based on the reasonable prediction of material disruption. Hypothetically, if the school board policy prohibiting unnatural hair color is based on reasonable beliefs that such hair color will materially disrupt the classroom, then the policy would probably be upheld. U.S. courts are split over hair issues such as color, length, and style. Therefore, it is critical that Howard and the superintendent know how the local courts stand on that particular issue. Likewise, the Confederate flag can be very disruptive in school if it is viewed as racially divisive, particularly if racial tensions already exist in the school district. If the community views the flag as patently offensive, then the school's prohibition against it could be justified. The legality of this dress policy is highly dependent upon the local school district's environment.

Howard and the superintendent will need to work closely with the media. Hopefully, Mr. Boyle signed the student code of conduct—which included the dress code—at the beginning of the school year. Moreover, if the school board garnered community support for the dress policy prior to its passage, then that will help address Mr. Boyle's complaint and any media frenzy that might ensue. Finally, the media and Mr. Boyle probably need to be gently educated that the rights granted by the First Amendment, as well as other federal and state rights, are not absolute, and such rights can be abridged for the greater good, such as maintaining school safety and discipline.

Student dress, like so many other education law issues, is a balancing act. Schools must balance student and parent rights with the need to provide an environment conducive to teaching and learning.

Student Publications

The Pleasant Valley High School *Beacon* is an award-winning newspaper. Over the years, student editors and faculty sponsors have taken great pride in the paper's mission to report the truth on a variety of issues, and students always look forward to receiving each edition. The newspaper's motto accurately describes the *Beacon's* mission: "Truth Enhances Student Knowledge."

Susan Chang, the *Beacon's* current student editor, approaches George Lutz, Pleasant Valley's principal. Susan tells George of her staff's interest in doing an investigative report for the next edition, the subject of which will be the quality of instruction in Pleasant Valley's classrooms. Susan wants George's permission to conduct a schoolwide poll in which students will be asked to evaluate their teachers on four basic items: (1) classroom teaching style, (2) knowledge of subject taught, (3) relationship between information received in a class and the grade received, and (4) student/teacher relationships. The *Beacon's* editorial staff will tabulate the results of the poll, which will be published under the title "Where's The Beef?"

Susan tells George that Wanda Brown, the *Beacon's* faculty sponsor, is excited about the story's potential. In her view, the story will serve two purposes. First, students working on the story will have a wonderful opportunity to engage in an activity that has pedagogical value. Second, considering that all students at Pleasant Valley High are evaluated on statewide end-of-course examinations, the results of the student poll will help the administration, in Wanda's words, "weed out any bad apples from the teaching staff before it is too late."

Susan asks George to please make a decision regarding the student poll as soon as possible. George begins to ponder his response and wonders how he should deal with Wanda Brown.

Background Discussion: Student Publications

Over the years, public school officials have faced a number of controversies related to student publications (e.g., newspapers

and magazines). Often characterized as freedom of the press or freedom of expression controversies, some of these matters have found their way into federal and state courts.

Student publications can be grouped into two general categories: school-sponsored publications (e.g., the school newspaper, yearbook) and non-school-sponsored publications (initiated and produced off-grounds using private sources of funding). While school officials have authority over all publications found on school property, they possess more authority over school-sponsored materials, including the content of said materials, whether produced as a part of a class, by a school committee, by an individual student, or by a student-initiated interest club. Regarding non-school publications, the general rule is that school officials have the authority to reasonably regulate the time, place, and manner of distribution, but not the content of these materials. However, where the content advocates something harmful (e.g., "hate speech") or illegal (e.g., drug use), or where disruption of the school learning environment might result, the regulatory authority of public school officials increases to keep the material off school property.

Legal Considerations

The First Amendment to the U.S. Constitution states, in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Made applicable to the states by the Fourteenth Amendment, these protections have been extended by the courts to students in public schools.

The U.S. Supreme Court opined in *Tinker v. DesMoines Independent School District* (1969) that students do not shed their First Amendment rights at the schoolhouse gate. Absent material and substantial disruption of the learning environment, interference with the educational process, or the creation of a harmful condition in the school, student First Amendment rights shall not be abridged. Undifferentiated fear or apprehension on the part of school officials is not enough to abridge these protections (*Tinker v. Des Moines Independent School District,* 1969).

While the Supreme Court has made it clear that students possess First Amendment rights, it has consistently held that student speech and press activities are not immune from control by administrators and teachers. Based upon reasonable pedagogical concerns, school principals and teachers may restrict student First Amendment rights when content is considered vulgar, obscene, or libelous, whether that content is expressed orally or in writing (*Bethel School District v. Fraser*, 1986; *Hazelwood v. Kuhlmeier,* 1988).

Federal Law

Although there are no specific federal statutes regarding student publications, some federal statutes might be implicated, depending on the nature of the issue. For example, using a forum analysis in applying the Equal Access Act might prove relevant in situations where equal access by individuals desiring to distribute publications in school is the primary issue.

State Law

Some state codes do contain statutes covering student expression, including student publications. Typically, these statutes are framed as disciplinary in nature. School officials are given the legal authority based upon *Tinker v. Des Moines* (1969), *Bethel School District v. Fraser* (1986) and *Hazelwood v. Kuhlmeier* (1988) to keep the school's educational environment free from disruption and inappropriate language in an effort to protect the well-being of all students and staff.

Case Law Examples

Eisner v. Stamford School Board (1971). Policies that allow for prior administrative review of student publications must be narrowly focused and the criteria used in the review must be tailored to pass muster under the First Amendment.

Jovner v. Whiting (1972). School officials are not free to "cut off funding" to a school publication with the intent of censoring the publication.

Gambino v. Fairfax County School Board (1977). Where the school newspaper is established as a public forum, it cannot be

viewed as a part of the curriculum. Thus, the First Amendment applies and the general power of a school board to regulate content does not apply.

Trachtman v. Anker (1977). School officials need only show a reasonable basis (e.g., harmful consequences to students) to justify restraints on publications distributed on school property.

Nicholson v. Board of Education (1978). Prior review of student articles in the school newspaper must be based upon reasonable rules. The school principal's intent in reviewing the material must be to ensure accuracy rather than to censor.

Williams v. Spencer (1980). Public school administrators have the authority to ban the distribution of non-school publications on school grounds where the contents of the publication endanger the health and safety of students.

Hazelwood v. Kuhlmeier (1988). The U.S. Supreme Court has held that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored newspapers, so long as their actions are reasonably related to legitimate pedagogical concerns.

Hemry by Hemry v. School Board (1991). Regulations applicable to the distribution of student publications must be uniformly and consistently applied to all student publications.

Boucher v. School Board (1998). The court upheld the discipline of a student who wrote an article encouraging other students to "hack" into the school's computer network. The disciplinary act was based upon a reasonable forecast of disruption of the school environment.

Policy Considerations

It is very important that local school board policy be applied in any decision-making process concerning student publications. The following are suggested policy questions to consider when dealing with this issue:

- Is there a specific policy related to student publications?
- Does the policy separate school-sponsored student publications from outside, non-school-sponsored publications?

- How are school-sponsored publications defined?
- Who (by title) is designated as the responsible school staff member in matters of school-sponsored publications?
- Does the policy make it clear that the school board retains legal authority over all publications found and distributed on school property?
- Does the policy clearly define the term *distribution* and its application to different types of publications?
- Does the policy designate a person (by title) whose review and permission must be received prior to the distribution of publications on school grounds?
- Does the policy establish steps to be taken during the prior review process, as well as specific criteria spelling out what is forbidden in a publication?
- Does the policy clearly forbid the use of libelous, slanderous, obscene, demeaning, and threatening language in student publications?
- What does the policy say about religious and political publications on school grounds?
- Does the policy include a mandate that there be a prompt decision regarding approval or disapproval of a publication's distribution?
- Is there an appeals process specified and a person designated (by title) to whom appeals are taken?

Practical Considerations

As the school principal, George does have the authority to decide, based on pedagogical reasons, the propriety of any school activity. In this case, he must be sensitive to both a potential for disruption of the learning environment and a possible negative impact on faculty morale. Since this matter does involve a school-sponsored newspaper, George has the authority to stop the investigative report from moving ahead.

George's next step is to call in the faculty sponsor, Wanda Brown. The purpose of the meeting must not be to chastise her for what is happening, but rather to hear about the matter from her vantage point as faculty advisor. Recognizing the *Beacon's*

positive reputation and the educational value of the investigative reporting exercise, George might ask Wanda if there is an alternative that could be explored with the student editors. Perhaps the investigative report could be more generalized, rather than focused on specific teachers in their particular school. George might go so far as to suggest that the students survey the literature on teacher shortages, teacher training, and teacher performance appraisal and evaluation, with the purpose of reporting on teacher quality in their state's public schools. In this way, the student readers can reach their own conclusions based on unbiased reporting. George should give Wanda a chance to think about his suggestion, discuss it with the paper's editors, and report back to him in one week.

If the student editor's original request does not change, George has no choice but to disallow the request for the survey. He must make it clear why he has reached this decision and that he will take disciplinary action if the students disregard his decision.

Postscript

While the school newspaper is a wonderful tool for instruction, it cannot be used as an instrument to evaluate or criticize staff. While students' rights clearly do not stop at the schoolhouse gate, school newspapers are not unbridled classroom tools that may be used to investigate personnel or make judgments regarding their performance. In this case—no matter how well intentioned the students or their faculty sponsor—use of the newspaper as an instrument to evaluate or criticize staff poses a reasonable risk of disrupting the educational environment and is therefore subject to restriction by the school's principal.

Part III

Students

Chapter 6

Internet Use

One evening over the winter break, Kurt Whelan, an honor roll student at the local high school, creates his own Web page, www.schoolsux.com. He creates the page at home using his own computer; no school hardware or software is involved in the site's production. The Web page criticizes the local school board for its handling of school snow closings and makes less than flattering comments about the intelligence of several teachers at the local high school. Kurt's site also features pictures of students and teachers that have been altered to make the subjects look as though they are nude. Further, the Web page contains a list of student and staff obituaries.

School is back in session after the winter break, and Sarah Smith, a high school junior, is in the school library doing research on the Internet for a science project. One of the sites that her search produces is Schoolsux.com. Sarah is surprised to see pictures of students and staff on the site with their faces transposed onto other people's nude bodies. She is even more surprised to see her picture among those that have been altered. Sarah is a classmate of Kurt's, and she immediately recognizes his name on the Web page. Thinking the site is funny, she e-mails it to her boyfriend and classmate, Steve, who is also in the library doing research. Steve does not find the picture of Sarah so amusing, and he immediately reports the site to the librarian and the science teacher. The librarian cannot understand how Sarah was able to access the site on the school computers.

"After all," she says, "we have filtering technology." The science teacher is appalled at what he sees on the Web page and immediately shows it to the principal, Stan Farley, who calls Kurt to his office. Kurt readily admits that he created the Web page at home.

Stan says, "You're such a bright young man, Kurt. Why would you do something like this?"

Kurt replies, "School bores me. This was just meant to be a joke."

Stan barks at his assistant to get the school's technology director, Diane Painter, right away. When Diane enters Stan's office, the principal says, "Diane, look at this site; how could it be accessed in our school? I thought you installed the best filtering technology on all are our computers!" Diane is speechless as she looks at the site on the principal's computer monitor.

Stan immediately suspends Kurt for 10 days and recommends expulsion to the superintendent. What should the superintendent do?

Background Discussion: Filtering Technology

Internet access in schools has increased significantly over the past decade. In 2000, 98 percent of public schools had access to the Internet, up from 35 percent in 1994 (National Center for Educational Statistics, 2001). The Internet provides a wonderful learning resource for schools, teachers, and students. However, its greatest asset, the abundance of information, is also its greatest detriment. In fact, the early concern about having Internet access in schools was that students would be exposed to inappropriate information such as violence, profanity, obscenity, or pornography. One public policy solution to these early concerns was federal, state, and local legislation requiring filtering or blocking technology to keep children safe in school.

Filtering is achieved by installing software on computer systems that blocks access to certain Web sites based on objectionable keywords or phrases, such as *weapons*, *pornography*, or *violence*. Blocking software prohibits access to known objectionable Web sites. The technology must be updated constantly,

and it is not fool proof. It does sometimes allow access to inappropriate sites while blocking legitimate sites.

Proponents of this type of technology believe that the slight inconvenience of restricting public school students' access to information on the Internet is necessary to keep those students safe. Opponents of filtering and blocking technology believe it violates the First Amendment and that the responsibility of guarding students from inappropriate information on the Internet should fall to teachers. All agree that the use of such technology is far from perfect because it is simultaneously over- and under-inclusive.

Legal Considerations

Little case law exists on the legality of filtering technology. Courts, legislatures, and school boards look at existing law regarding other mediums and extrapolate principles from them to apply to the Internet. Some legal principles apply seamlessly, while others do not. The law and public policy in this arena continue to evolve and emerge.

Federal Law

The First Amendment to the U.S. Constitution states, in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Although the people are guaranteed the right to free speech, which includes the receipt of information, the Supreme Court has decided that students' constitutional rights are not absolute in schools because of the special circumstances of the school environment (*Tinker v. Des Moines Independent School District*, 1969). Various courts have upheld the right of school officials to regulate speech where legitimate pedagogical concerns exist (*Bethel School District v. Fraser*, 1986; *Hazelwood v. Kuhlmeier*, 1988).

Federal law, including the Children's Internet Protection Act (CIPA), does require elementary and secondary schools that receive federal e-rate and technology funding to install and use filtering or blocking technology (47 U.S.C. § 254).

State Law

Individual state codes may require the use of filtering or blocking technology. Consider the following examples:

• Arkansas. A.C.A. § 6-21-111. "A public school that provides a public access computer shall equip the computer with technology that seeks to prevent minors from gaining access to material that is harmful to minors or [shall] obtain Internet access" from a provider that offers filter services.

• Arizona. A.R.S. § 34-502. Similar to Arkansas, Arizona requires the use of technology to prevent minors from accessing harmful material.

• Virginia. Va. Code Ann. § 22.1-70.2. Virginia schools must "select a technology for the division's computers having Internet access to filter or block Internet access . . . to child pornography and obscenity."

Case Law

Mainstream Loudon v. Board of Trustees of Loudon County Library (1998). The use of Internet filtering technology in a public library, not a public school, was held unconstitutional. The court concluded that filtering Internet access in the library violated the First Amendment because the library created a limited open forum and the content-based restriction was not tailored specifically to achieve the protection of minors. In other words, the court concluded that less restrictive means of protecting minors exist, and that the use of filtering technology was over inclusive because it applied to the adult patrons as well. This analysis likely would not apply to a public school due to its unique environment.

Policy Considerations

Despite the dearth of laws specifically mandating the practice, 74 percent of all public schools with Internet access used blocking or filtering software in 2000 (NCES, 2001). When crafting school board policy for Internet blocking or filtering, consider the following:

• The software. The school's Internet protection program is only as good as the technology employed. Several software programs exist and computer experts should be consulted to determine which programs are most effective.

• Implementation. Once the software is installed on school computers, the policy must make provisions for regular monitoring and updating.

• Mistakes. Blocking and filtering technology are not perfect. Certain objectionable material may be accessed. Protect the school by having an acceptable use policy that prohibits students from accessing inappropriate information. In addition, have a plan for correcting blocking or filtering of legitimate educational sites that are inadvertently blocked because they may contain objectionable key words, such as *sex*.

• Parental permission. Because filtering technology is imperfect, schools should ensure that parents acknowledge and accept the risks of Internet use by requiring parental permission for students to access the Internet.

• Monitor student activity on the Internet.

Postscript

As the technology director, Diane should remind Stan that even with the best and most current filtering technology, mistakes occur and children are exposed to obscene material. Diane and Stan should ensure that the school is indeed using the best available technology and that it is monitored and updated regularly. Although the legality of using filtering technology has not been tested to date, it seems likely that appropriate use of such technology in schools would be upheld. School liability for the inaccuracy of such technology also remains untested, so the best protection for the school and its administrators is parental acknowledgment and acceptance of the risks associated with Internet use in the form of a signed permission slip.

The availability of technology, specifically Internet access, has introduced a new set of challenges for school administrators. Whereas the law and public policy have not kept abreast of

this rapidly changing area, schools daily confront issues of discipline and security related to the Internet. Whether a drawing on a book cover or a graphic on a Web site, the same rules of behavior should apply; only the medium has changed.

As the superintendent looks over Kurt's case, he must consider what disciplinary action would be appropriate for similar behavior. A short-term suspension of 10 days or less is reasonable and a long-term suspension of more than 10 days may be warranted, but expulsion is probably too severe in a case that did not involve a threat of harm.

Merely disciplining Kurt, however, will not make the school's Internet problems go away. To further address the issue, the superintendent and the school board should update their policies regarding Internet security. They should also review their current computer system to determine if the firewalls are adequate. Many school divisions use programs to filter unwanted language and content. No matter how diligent school officials may be, the rapidly changing nature of technology makes students' access to potentially inappropriate material difficult to control.

Chapter 7

Student Organizations/Clubs

The administration and staff at West High School, which has an enrollment of 1,450 students in grades 9–12, value student participation in clubs and other extracurricular activities. At the beginning of each school year, students are encouraged to get involved in various clubs and organizations. If no existing club interests a student, he or she is encouraged to organize one. All student clubs and organizations, not including interscholastic teams, band, student council, and cheerleading, meet once a week on Tuesday afternoons. The meetings take place during the school day as a part of an official club period. The club period is scheduled so as not to interfere with instructional time.

School board policy requires each student club to articulate a clear purpose in writing, have a constitution and by-laws, follow a non-discriminatory procedure when admitting new student members, and select a faculty sponsor. Further, the principal must monitor each club to ensure that the group's goals and objectives remain consistent with the school board's mission and policies. School board policy also specifies that any student interested in establishing a club or organization at West High must present an official request to the principal and receive his or her prior approval.

On the first day of school, Asim and Chandra, two 9th graders at West High, submit a formal written request to the school's principal, Doug Levy, to establish a new club. The students

clearly state in their application for approval that their club, Truth Seekers, will meet all the formal conditions and requirements specified for student organizations. The purpose of the new club, according to the application, will be "to allow opportunities for all interested students to come together once a week to read and discuss the works of the world's great thinkers, past and present." According to procedure, Doug must make his decision to approve or disapprove of the club by the end of the week. He remembers that one of his last decisions of the spring term was to grant the request of two other West High students to form a Key Club.

Background Discussion: Student Clubs and Other Organizations

Traditionally, student clubs and organizations have been, and remain, important forums for student interest and expression in nearly all U.S. public schools, especially those at the secondary level. As a general rule, school systems draw a distinction between school-sponsored, curriculum-related student groups and student-initiated interest groups. The latter organizations, while neither curriculum-related nor school-system sponsored, are nevertheless required to gain official approval prior to recruiting students and meeting on school property. Regarding both types of student clubs (curriculum-related or student-initiated), public school boards, administrators, and staff possess legal authority to set the time, place, and manner of all activities conducted on school grounds and at school-sponsored activities; maintain order and discipline on school property and at school events; and exercise their duty to protect the well-being of all students and staff.

In recent years, school board policy, rules, and authority have been tested by requests to meet on school grounds from a host of new student groups, several of which possess politically or socially motivated agendas (e.g., Young Republicans, Gay-Straight Alliance). Questions have also been posed concerning the relevance and appropriateness of more traditional student groups (e.g., Fellowship of Christian Athletes, Boy Scouts/Girl

Scouts of America). The result is a general questioning of what should be done with student clubs and organizations.

Legal Considerations

The First Amendment to the U.S. Constitution guarantees all citizens the rights of freedom of religion, speech, and press, and the rights to peaceably assemble and to petition government for redress of grievances. The Fourteenth Amendment made these rights applicable to the states, and public school systems, as arms of state government, must therefore abide by the requirements of the First Amendment (*Tinker v. Des Moines Independent School District,* 1969).

Federal Law

According to the Equal Access Act, it shall be unlawful for any public secondary school that receives federal assistance and maintains a limited open forum to deny access or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

A public secondary school has a limited open forum whenever that school allows one or more non-curriculum-related student groups to meet on school premises during non-instructional time.

State Law

In addition to federal constitutional law and related federal court decisions, school officials must also apply appropriate state statutory law and the decisions of state courts under whose jurisdiction their school system falls. For example, in Virginia, hazing of student organization members is explicitly prohibited (Virginia Code, 1996).

Case Law Examples

Lemon v. Kurtzman (1971) and Lynch v. Donnelly (1984). The First Amendment requires that public school boards,

administrators, and staff members maintain a position of neutrality (non-establishment, non-endorsement), but not hostility regarding matters of religion. As stated earlier in this text, to evaluate the constitutionality of a public school program or other activity in terms of possible Establishment Clause violations, the following questions must be asked: (1) Does the activity have a clearly secular purpose? (2) Does the activity either advance or inhibit the free exercise of religion? (3) Does the activity excessively entangle the public school system with religion?

Healy v. James (1972). School officials can require that all student groups conform to school policies, procedures, and rules as a precondition for gaining official recognition and access to school facilities.

Widmar v. Vincent (1981). State university officials granting equal access use of a school facility to a student group for the purposes of religious worship and religious teaching does not violate the Establishment Clause of the First Amendment under the standard articulated in *Lemon v. Kurtzman* (1971).

Board of Education v. Pico (1982). The protections of the First Amendment encompass the rights of students to foster self-expression for the purposes of debate, discussion, and the dissemination of information and ideas.

Perry Education Association v. Perry Local Educators (1983). The nature, function, and past pattern and practice of using a public forum must be examined and evaluated before access is granted, denied, or withdrawn. Access to a forum must be evaluated using "viewpoint neutral" regulations. Moreover, a speaker's subject must fit the purpose for which the forum was created.

Tinker v. Des Moines (1969); Bethel School District v. Fraser (1986); and Hazelwood v. Kuhlmeier (1988). Absent a clear showing of material and substantial disruption, the use of obscene or vulgar language, or the presence of subject matter that is illegal, harmful, or deemed inappropriate by school officials, violations of a student's substantive right to free expression will not survive judicial scrutiny.

Board of Education v. Mergens (1990). The Equal Access Act applies to public schools. A limited open forum exists when a public secondary school allows student-initiated,

non-curriculum-related groups to meet on school premises during non-instructional time. To be a curriculum-related club, a student group must have a tangible relationship to the body of courses offered at the school. More specifically, the club must meet at least one of the following criteria: (1) The group's subject matter must be (or will soon be) taught in a regularly offered course; (2) the group's subject matter concerns the body of courses as a whole; (3) participation in the group is required in a particular course; or (4) academic credit is given for participation in the group.

Allowing a school faculty member to serve as a club sponsor does not violate the law per se. However, the faculty member's duties must remain supervisory, clerical, and not involve his or her active discussion of religious topics.

Rosenberger v. Rector and Board of Visitors (1995). School officials are cautioned not to treat some student groups differently from other student groups simply because of the viewpoints expressed by those student groups. Once a school has created and opened a limited forum for student expression, the school must respect the lawful boundaries it has itself created.

Good News Club v. Milford (2001). Where a school system, as a matter of policy, allows its students to discuss certain topics, the mere fact that a student group addresses these topics from a religious perspective does not constitute cause to deny the group equal access to school facilities.

Gernetzke v. Kenosha Unified School District (2002). A public high school principal denied the request of a student Bible club to paint a mural in the school hallway. The proposed mural—which, if accepted, would be among other murals painted by student groups—depicted a heart, two doves, a Bible open to John 3:16, and a large cross. In justifying his decision, the principal argued that the cross is so "salient a Christian symbol that it would invite an Establishment Clause challenge." The court ruled that the principal's denial did not violate the First Amendment.

Pope v. East Brunswick Board of Education (1993). The court ruled in favor of students who requested permission to establish a Key Club at the high school.

Ciniceros v. San Diego Unified (1995). The court held that because lunch period was not considered "instructional time" and other student groups met during that time, a student religious club could also meet on school grounds during that time period.

Colin ex rel. Colin v. Orange Unified School Dist. (2000). The court held that a student initiated Gay-Straight Alliance Club should have equal access to the school's limited open forum and should be accorded the same rights and privileges as other student groups.

Boy Scouts of America v. Till (2001). Excluding the Boy Scouts from using public school facilities during off-school hours when other outside private groups (e.g., churches) have been granted permission to use the facilities violates the First Amendment.

Policy Considerations

The application of local school board policy is of critical importance in making decisions concerning the appropriateness of student groups and organizations. Consider the following questions when making such assessments:

- Does your local school system have a specific policy governing student clubs and organizations?
- How does the policy define *school-initiated, curriculum-related student groups* versus *student-initiated, non-curriculum groups*?
- Does the policy make it clear that the school board and its administrative staff members maintain complete control over all clubs and other organizations meeting on school grounds?
- Does the policy state that all student clubs and organizations must gain approval from the appropriate building-level administrator (e.g., principal or assistant principal) prior to meeting on school grounds?
- Does the policy require all student groups to have a formal constitution, by-laws, and a faculty sponsor?
- What does the policy say about sponsor involvement in group discussions and activities?
- Does the policy state that membership in student groups is

voluntary, and that students shall not be subject to coercion to join any group?

- Does the policy require every group to maintain a non-discriminatory recruitment and member admittance procedure?
- Does the policy state that no approved student group shall be denied access to school property for conducting meetings and other related activities?
- Does the policy allow all approved student groups to use school bulletin boards, computers, mailboxes, and public address systems for group business?
- Does the policy make it clear that a club or organization can lose its approved status by engaging in or advocating illegal, harmful, or disruptive behavior, or by advocating a philosophy contrary to the mission and values of the school system?
- Does the policy prohibit hazing of new members?
- What does the policy say about disciplinary procedures if a student group disrupts the school environment or engages in some form of illegal or harmful activity?
- What does the policy say about dues, fundraisers, financial records, and the auditing of financial accounts?
- What does the policy say about outside speakers and community-based group projects?

Practical Considerations

Doug must be certain not to treat Asim and Chandra's request to start the Truth Seekers Club any differently than similar requests have been treated in the past. All student-initiated clubs should be tested against the same standards. The time of the meetings, the age of the students in attendance, and the nature of the meetings must be considered when making a determination regarding the appropriateness of a group gaining access to school facilities. In addition, the perception that school officials are endorsing religious views must be avoided.

It is important that Doug keep in mind the value placed by staff on student participation in extracurricular activities and the encouragement students receive to organize their own interest clubs. Equally important is the fact that the school has

established and maintains a formal club period during the instructional day when student-initiated clubs meet.

As a first step, Doug must request a copy of the new group's constitution and by-laws. He must also insist that the group follow a non-discriminatory procedure regarding membership and request that a faculty member willing to volunteer his or her time contact him as soon as possible. Doug must carefully review all required documents and personally meet with the proposed faculty sponsor to clarify his or her supervisory role.

Once the students have complied with all of the requirements for student clubs and a faculty sponsor is in place, Doug has no choice but to let the Truth Seekers meet during the regularly scheduled club period. The fact that Doug, as dictated by school board policy, will be monitoring the activities of this club, as well as all others, means any problems can be dealt with as they occur.

Postscript

The key to approval of club groups is consistency. Administrators have frequently used the shield of "disruption" as a method of disallowing groups whose idea s may not be consistent with the school and community. Schools must give students and faculty notice of what is expected prior to taking any type of official action. Making the rules on an ad hoc basis invites litigation. Policies that are clearly stated and consistently administered rarely raise concerns of discrimination.

Chapter 8

Part-time Admission of Students

Over the last decade, the homeschool movement has steadily gained popularity in the Glen Oaks school district. In fact, the number of homeschooled children has risen 35 percent in that time, as more and more parents have chosen to keep their children out of the public school system. Although the superintendent has tried to get the school board, the staff, and the community to address homeschooling and its effect on the local public schools, everyone seems to be in denial about its existence.

Recently, however, some homeschoolers have recognized that they cannot provide everything for their children's education at home. Therefore, they have asked the board to allow their children to participate in certain extracurricular activities, such as band and football. Also, several homeschooled students have asked to take advanced placement math and science courses at one of the local high schools. The most recent request has come from Maury Lohman, a bright young man who excelled in the public middle school, but who has been homeschooled for the past two years. Mr. and Mrs. Lohman have asked the school board if their son can participate on the high school football team and take AP calculus and physics at the high school. Mrs. Lohman, who has been teaching Maury in all of his required subjects for the last two years, claims she is not qualified to teach advanced calculus or physics. Moreover, she states, "The tutor recommended by the Homeschool Association is very poor."

Informally, the superintendent has talked to the five board members about the Lohmans' request and anticipates a split vote. Three of the board members unequivocally replied, "It's all or nothing. Maury can come to our school like the other students, or he can't participate at all." The two remaining members feel that the board should be inclusive of homeschoolers, arguing that the public schools in Glen Oaks are just as much for homeschooled children as they are for other children. The superintendent and other staff worry about the cost, wondering how they will pay for Maury. Further, they fear that allowing Maury to attend the school could create a slippery slope for part-time student attendance that would eventually become financially insurmountable. Realistically, the superintendent feels that if the public school can get homeschooled students or private school students to attend part-time, it is likely that they will eventually attend full-time. The chair has asked the superintendent to recommend and draft a policy to address the increasing number of requests for part-time admission to the district's public schools.

What policy should the board adopt to address Maury's request?

Background Discussion: Part-time Admission of Students

Over the past two decades, more and more families have chosen to educate their children outside of the public school system. And the number of students taking advantage of the available education alternatives—homeschooling, voucher programs, and charter and private schools—continues to grow. In fact, the number of homeschooled students in the United States rose from approximately 300,000 students in 1992 to 1.5 million students in 2000 (Grob, 2000). However, even as their numbers swell, some non-public school students are realizing that their choice of educational forum cannot give them everything they want. These students, therefore, are looking to the public schools to supplement their private or homeschool education.

This trend leaves school boards, state policymakers,

educators, and parents with tough choices. Financial, educational, political, and philosophical issues all come into play, both when choosing an education for children and allowing part-time admission to public schools. Overwhelmingly, the issue of part-time admission is left to local school boards and school administrators. Most parents know or assume that if they choose a non-public school education, their children will not be able to participate in public school activities. Increasingly, however, as the growing number of these children and their parents become more organized, the issue is moving into the political arena. Educators, parents, and policymakers are looking for solutions to the growing dilemma.

Legal and Policy Considerations

Federal Law

Federal challenges to denial of part-time access have been based on the First Amendment right to free exercise of religion, the Fourteenth Amendment due process clause, and the equal protection clause.

• *Swanson v. Guthrie Independent School District No. I-1*(1998). The school policy required full-time attendance. Later, the school board added a sentence to the policy stating that it would reconsider the full-time enrollment policy if the State Board of Education allowed part-time students to be counted for state aid purposes. Based on the existing policy, however, a home-schooled child was denied part-time admission for academic classes. The student's family argued that this policy interfered with their religious beliefs. The court ruled that "the policy does not prohibit [the family] from homeschooling Annie in accordance with their religious beliefs, and does not force them to do anything that is contrary to those beliefs." Further, the court found no due process property interest in part-time participation. Finally, the court stated that "decisions as to how to allocate scarce resources, as well as what curriculum to offer or require, are uniquely committed to the discretion of local school authorities. . . ."

• *Hooks v. Clark County School District* (2000). A homeschooled student was medically eligible for speech therapy services. The school division decided not to provide the services. The school policy stated that students who utilize the homeschool exemption do not have access to public school instruction or services. The court determined that the Individuals with Disabilities in Education Act (IDEA) leaves states the discretion to determine whether the homeschooling exemption constitutes an IDEA qualifying private school or facility or not. With regard to federal due process claims in directing their child's education, the court found no violation, stating, "[T]he Hooks family does not have the right to pick and choose the services offered by the school district." The court further opined that the school had a legitimate reason to deny services, "steering scarce educational resources toward those qualified educational environments."

State Law

Many unsuccessful attempts to reverse the denial of part-time participation in public school activities have been based on federal constitutional challenges. Therefore, students and parents have turned to state courts and legislatures for relief. Some states, by statute, have created a qualified right for homeschooled students to participate in public school activities.

• Arizona. A.R.S. §15-802.01: Interscholastic activities. Children instructed at home shall be allowed to try out for interscholastic activities in the same manner as children enrolled in the public school. Students, however, must abide by school policies and demonstrate that they are receiving passing grades and maintaining satisfactory progress toward advancement or promotion. Further, schools are prohibited from contracting with any private entity that does not allow homeschooled children to participate in interscholastic activities.

• Colorado. C.R.S. § 22-32-116.5: Extracurricular and interscholastic activities. "[E]ach school district and each public school . . . shall allow any student enrolled in a school or participating in a non-public home-based educational program to participate on an equal basis in any activity offered by the school district or the public school that is not offered at the student's

school of attendance or through the student's non-public home-based educational program." The law does, however, offer the schools the option of reserving a certain percentage of starting positions or team membership positions to students enrolled in the school. These provisions are intended to allow students equal opportunity to participate rather than to encourage or sanction recruitment of certain students.

• Colorado. C.R.S. § 22-33-104.5: Funding. To address the financial burden of part-time students on local public schools, some states have allowed state funding for part-time admission in academic or core courses, but not extracurricular activities. If a child is homeschooled but also attends public school for a portion of the school day, then that child can be counted for the purposes of determining pupil enrollment under the Public School Finance Act of 1994. However, participating in an extracurricular or interscholastic activity does not count toward pupil enrollment for funding purposes.

• Idaho Code §33-203: Dual enrollment and funding. Children enrolled in a non-public school or a public charter school must also be allowed to enroll in the public school. However, priority for programs shall be granted to students enrolled full-time in the public, non-charter school. The legislature allows dual-enrolled students to be included for the purpose of state funding "only to the extent of the student's participation in the public school programs."

• Maine. 20-A M.R.S. §5021: Academic, co-curricular, and extracurricular activities and funding. Homeschooled students may enroll in specific day-school classes at the appropriate public school if certain conditions are met. For example, students must apply in writing, show satisfactory academic achievement, and comply with behavioral, disciplinary, attendance, and other classroom rules. In addition, transportation must be provided by the parent(s). Maine also requires that academic credit be given to such students and requires special education services for homeschooled students. Homeschooled students, under this statute, are also eligible to participate in co-curricular and extracurricular public school activities.

Maine also permits reimbursement for part-time admission

of students who are homeschooled. A school is "entitled to receive a state subsidy for any student who receives instruction through one or more on-site academic courses from a public school but is not a full-time student."

• Oregon. O.R.S. § 339.460. Homeschooled students shall not be denied the opportunity to participate in interscholastic activities if the students meet all school division eligibility requirements, excepting class attendance.

• Virginia. Va. Code Ann. § 22.1-253.13:1(H): Funding. Students enrolled in a public school in core courses on a less than full-time basis shall be counted in average daily membership on a pro rata basis.

• *Davis v. Mass. Interscholastic Athletic Association* (1995). A school board denied a student part-time access to participate on the softball team because the student did not attend class. The court held that the student must be allowed to participate.

• *Thomas v. Alleghany Co. Board of Education* (1982). The court determined that the school board's decision to deny private school students the opportunity to participate in the music program was permissible. The court found that parents have a right to choose the religious and educational training of their children, but that that choice does not include the right to educate in a private, religious school and still remain eligible for participation in public school activities. The court also noted that the school had a legitimate interest in avoiding the administrative burden associated with such dual enrollment. Further, the court held that the absence of state funding is a rational basis for denying part-time admission.

• *Kaptein v. Conrad School District* (1997). The school denied the request of a student attending a private Christian school to participate in public school athletics. The reason for the denial was the administrative burden associated with part-time admission, such as ensuring that the same academic and attendance standards are met and maintaining control of school-owned equipment. The Montana Supreme Court upheld the school board's decision to require full-time enrollment to participate in extracurricular activities, ruling that the student had no fundamental right to participate in extracurricular activities.

• *Snyder v. Charlotte Public School District* (1984). The Michigan Supreme Court held that the school board's decision to deny a private school student the opportunity to participate in the public school band class violated the student's equal protection rights. The court concluded that "programs offered in the public schools [must] be made available to all students, whether from public or private schools, on an equal basis." The court also held that public schools are not required to provide core curriculum to non-public school students. Although there was no specific statute requiring part-time enrollment, the practice was accepted in the state and the legislature allowed funding to school divisions for students who attend public schools part-time.

Practical Considerations

Overwhelmingly, part-time admission to public schools of private and homeschooled students is a policy, not a legal, issue. Each board must decide this issue based on the needs of the school, the students, and the community within the district. When contemplating a part-time admission policy, consider the following:

• Does the state allow part-time students to be included in student membership for funding purposes? If not, does the admission of such students pose a financial hardship?

• What are the state athletic association rules and regulations for part-time participation in extracurricular or athletic events?

• Will parents of part-time students provide transportation to and from the public school activities?

• Will participation in extracurricular or athletic activities be tied to taking academic classes? Or, will the school permit students to participate only in extracurricular or athletic activities?

• Part-time students must comply with all school rules and codes of discipline, excepting full-time class attendance.

• Will credit be given to part-time students in academic classes?

• Will class rank or grade point averages be calculated for part-time students?

• What is the administrative burden or cost of admitting students part-time for academic or extracurricular activities?

• Are special education services offered for homeschooled or self-selected private school students? Consult a special education attorney or expert.

• What does the state law or constitution require?

Postscript

Generally, the issue of whether or not to allow part-time attendance of non-public school students, such as private school or homeschooled students, falls to local school boards to decide. In only about 25 percent of states is some form of part-time admission to public school activities required, permitted, or encouraged by state law or constitution.

Only if Maury's school division is in one of those states requiring part-time admission for academic and/or extracurricular activities must the superintendent recommend his admission. Even with such legislation, the superintendent and the school board still have the right and need to establish procedures, guidelines, and conditions for such admission. These procedures could address the financial effect, as well as the administrative details, accompanying such admission.

Absent such a statute, the board and superintendent have two choices: deny part-time participation in public school activities outright, or allow participation for some or all school activities under the conditions and parameters established by the board. The law has consistently upheld school boards' decisions to deny part-time access to public schools. In particular, this holds true for school divisions in states where no funding is available for part-time students or the administrative burden is too great. If the board chooses the second option and allows part-time admission, then it must carefully craft a policy addressing who can participate and in what activities.

Part-time admission to public school in an era of school choice is an issue requiring a variety of political, philosophical, and educational considerations. While some citizens believe all children should have access to public school activities, even on

a selective basis, others believe that public school is an all-or-nothing proposition. Some educators feel that even part-time admission or participation in public school activities is beneficial to children's overall education (and may even lead to a full-time return to the public school system). Others feel that such admission is detrimental and unfair to the full-time public school students because of the added financial and administrative burdens and the potentially divisive or disruptive effect on the school. Gaining community, staff, homeschooler, and private school input though a task force or open meeting may make easier the school board's decision regarding this tough issue.

Chapter 9

Student Medicine

Jodie Betz, a high school senior, suffers from headaches for which she regularly takes an over-the-counter, extra-strength pain reliever. Sometimes, the headaches are so bad that Jodie takes prescription migraine medicine. In fact, if she takes this medicine at the first sign of a headache, she suffers far less and can often prevent a full-blown migraine. Jodie plans to go to a friend's slumber party over the weekend, so her mother puts both the over-the-counter medication and the prescription medicine in Jodie's purse before the party, just in case she feels a migraine coming on. Fortunately, Jodie does not experience a flare-up over the weekend, but both medicines are still in her purse when she rushes out the door to catch the school bus on Monday morning.

During second period calculus, Jodie's friend and classmate, Cindy Harris, complains of a terrible headache. Jodie whispers, "Here, try this. It helps my headaches. And if that doesn't work, I'll give you this—it's from my doctor and always makes my migraines go away." Bart Kline, the teacher, notices the exchange of small red and white pills between the girls. But before he can get their attention after the bell, the two are already halfway down the hall. During the break between classes, Cindy takes the pain reliever with some water from the hall fountain.

Bart knows Jodie and Cindy are good kids—great students

and straight as arrows, never taking drugs or even a sip of beer. But school policy prohibits medicine in school except with parental permission and when administered by the nurse, so Bart reports the pill exchange to the principal.

The principal, Denise Osgood, immediately calls Jodie and Cindy into her office, relates to them what their calculus teacher has reported to her, and tells them, "I'm sorry girls, but I think I have to suspend you. Let's call your parents." Upon receiving the call from Denise, the Betzes and the Harrises are very upset. Although they understand the school's rules, both girls' parents ask Denise whether an exception can be made. "The girls meant no harm," Cindy's father argues. "This will ruin their great school records."

Just as the principal is explaining the school's zero tolerance policy, the assistant principal rushes in the door and says, "Quick, get to the gym! Sam Betz is having an asthma attack. The gym teacher called the school nurse and she just gave him his inhaler, but it's no use, he still can't breathe." As everyone is running out the door, Mr. and Mrs. Betz exclaim, "We told you to let Sam keep the inhaler on him. If he doesn't get the medicine in time, he could die or suffer brain damage from lack of oxygen. The time it takes for the nurse to get from her office to the gym is too long."

How should the principal address Jodie, Cindy, and Sam's situations?

Background Discussion: Student Medication in Schools

Student possession and use of medication, both prescription and non-prescription, are complex school issues. Student health and safety are at stake, as well as school board and school employee liability and immunity. Generally, student medication is a local school board policy issue. A few states have laws that address the possession or administration of certain medication for students. Further, in a few instances, federal disability law may address student medications.

Legal and Policy Considerations

Federal Law

Three federal disability laws and their accompanying regulations may address the issue of medication for specific students. These laws are the Individuals with Disabilities in Education Act (IDEA), Title 11 of the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act. Under these laws, schools can occasionally be required to provide medication to students to either accommodate a disability or ensure the child access to an education.

In *DeBoard v. Board of Education of Ferguson-Florissant School District* (1997) and *Davis v. Francis Howell School District* (1998) school policy prohibited school employees from administering medication to students in doses above those recommended in the *Physicians Desk Reference* (PDR). Both students at issue asked the schools to administer more of the prescription drug Ritalin than was recommended in the PDR. The parents claimed the refusal violated the ADA and the Rehabilitation Act. However, the court found in favor of the school boards because the policies were neutral and applied to all students, regardless of disability. Also, the schools offered to accommodate the administration of such medication by allowing parents or other relatives to come to school to give the medicine. For a discussion of these cases, see "Reading, Writing and Ritalin: The Responsibility of Public School Districts to Administer Medication to Students" (Schultze, 1999).

State Law

Instances of students dying or suffering grave injury for lack of insulin, epinephrine, or an inhaler have put student medication use and possession on the public agenda. In some states, such tragedies have sparked legislation to minimize harm to students and liability to school employees.

- Connecticut Gen. Stat. § 10-212a. This law authorizes the school nurse or, in the absence of the school nurse, another employee to administer medicine to students. The statute also provides these school employees protection from liability. No

such school employee "shall be liable to such student or a parent or guardian of such student for civil damages for any personal injuries which result from acts or omissions of [such school employee] in administering such [medicine] which may constitute ordinary negligence." The immunity, however, does not extend to willful or wanton negligence.

• Georgia. O.C.G.A. § 20-2-774. School boards must adopt a policy permitting the self-administration of asthma medication for students. The statute provides immunity for school employees and its agents for student injuries resulting from the self-administration of such medication.

• Nebraska. R.R.S. Neb. § 79-249. Schools in Nebraska are prohibited from administering medication unless they comply with the Medication Aide Act (MAA) (§§ 71-6720 et seq.) The MAA permits a school employee to participate in the administration of medication to students by "mouth, inhalation, topical or instillation into the eyes, ears and nose." School employees may also administer medication via other routes if they are designated as competent to perform such activities by a licensed health professional.

• Texas Educ. Code § 22.052. This section gives immunity to school employees who administer medicine to students, provided the school board adopts a policy addressing the administering of medicine and the school possesses a written request to administer the medicine from the parent or legal guardian. The medicine must also appear to be in the original container and to be properly labeled. This law, however, does not grant immunity for gross negligence.

• Virginia Code § 8.01-225. Any person who administers epinephrine to an individual for whom an insect sting treatment kit has been prescribed shall not be liable for any civil damages for ordinary negligence in acts or omissions resulting from such treatment. This law also provides immunity for school board employees authorized by a prescriber and trained in the administration of insulin and glucagon to administer such medicine based on written parental request.

• Virginia Code § 8.01-226.5:1. Any school employee who supervises the self-administration of inhaled asthma medicine

by students shall not be liable for any civil damages resulting from the supervision.

• Virginia Code § 22.1-274.2. Local school boards must develop and implement policies permitting a student with a diagnosis of asthma to possess and self-administer inhaled asthma medication at school.

Practical Considerations

A student medication policy is essential, regardless of whether or not the particular state legislature has addressed the issue by statute. A good medication policy can keep students healthy and safe while simultaneously insulating employees from liability for good faith actions. When developing a policy regarding student medication, consider the following:

• Under what conditions will students be permitted to self-administer medication (what factors will be taken into consideration)?
  – Age of student.
  – Parental permission (ongoing or temporary).
  – Nature of medication (prescription, non-prescription, or both).
  – No sharing of medication with other students.
• Where will medication be stored?
  – What types of medication, if any, can students possess or keep on their person?
  – Will the school nurse be the custodian of medication?
  – If the school does not have a nurse, where will medication be stored?
• Written parental consent must be on record for the administration of prescription and non-prescription medication.
• What written information from a student's physician is necessary or desirable?
  – Identity of student.
  – Name of medication, dosage, and frequency of administration.
  – Testimony to the student's ability to self-administer medicine (if allowed).

– Identification of potential risks if the student is not permitted to possess and self-administer the medication.

• Allow for the development of an individualized health care plan, if necessary, such as pursuant to an IEP.

• Consult with a student's parents, if necessary.

• Plan the disclosure of health information to employees who need to know, consistent with state and federal privacy laws.

• Delineate roles and responsibilities of key personnel.

• Provide information and training for employees.

• Consult with health care professionals, educators, and attorneys.

Postscript

Regarding Jodie and Cindy's situation, suspending good children and students is never easy. In this instance, the girls made a mistake with no malicious intent. But unless the school policy allows for a lesser punishment based on mitigating circumstances, Denise must follow through with the prescribed consequence. However, as a result of this incident, the principal might suggest that the policy be reexamined.

The issue of Sam and the inhaler is slightly more complicated. No federal or state law requires the school to allow Sam to self-administer the asthma inhaler. The staff followed policy by calling the nurse to bring and administer Sam's emergency medication. Nonetheless, the school may want to reexamine this portion of the policy as well, and permit certain competent students to possess and self-administer prescription medication. Further, the school board might consider the circumstances surrounding the use of medication. For example, if Sam's asthma attacks are precipitated by physical activity, why is he participating in gym?

Determining how medication at school should be administered is a tough issue for policymakers, who must balance student health and safety with the fear of liability for school employees who may want to aid students but are scared to do so. Moreover, if policies governing the administration of medication are too permissive, then students may use them to their

advantage for illicit activities such as selling drugs. Like so many other school law issues, decisions regarding student medication require the balancing of competing interests against the paramount consideration of student health and safety in an environment where effective teaching and learning can occur.

Chapter 10

Student Records

Nancy Espinoza, West High's newly appointed director of guidance and student personnel affairs, sits down at her desk to prepare for a meeting with her principal, Franklin Markiewicz. When Franklin enters Nancy's office, he asks her why she has scheduled the meeting. Nancy explains that she needs his advice regarding three requests made to her about gaining access to student records. She is not sure what to do and needs Franklin's help in responding to each request.

The mother of Bradford D. Willingham Jr., a 15-year-old sophomore at West High, made the first request. Mrs. Willingham, a prominent member of the community, told Nancy that she recently was granted custody of Bradford and his two sisters. She wants to "review Brad's record to be certain that he is on track toward graduation." In the course of their conversation, Mrs. Willingham admonishes Nancy not to allow her former husband to see any information concerning Brad.

Officer Carla Draper of the local police department made the second request. She wants to review the record of Eileen Dean, a 17-year-old senior at West High. It seems that Eileen is a prime suspect in a recent rash of shoplifting incidents at a local shoe store. Officer Draper indicated to Nancy that she would come by the school on Friday to see Eileen's record.

The third request involves Scott Ferguson, a 9th grade English teacher at West High. Scott has asked for permission to

review the records of all 11th grade male students whose poor academic performance and/or disciplinary problems might lead them to consider dropping out of school. Scott is completing a master's degree in school counseling at the local university. As part of a graduate seminar, he is required to design, plan, and carry out an experimental study involving research on a current issue in public schools. His study is titled: "Social, Economic, and Cultural Factors Leading to Behavioral Problems in At-Risk Students." Scott is in a hurry to gather data and needs immediate access to the school records.

Franklin sits down in a chair across from Nancy and begins to think about how she should respond to each request.

Background Discussion: Student Records

Until very recently, and prior to the availability of computers and other forms of technology, student record-keeping in public school systems was limited in scope and form. In addition to reporting a student's academic progress from year to year—more often than not, in secondary school, the record was dominated by a transcript of subjects taken and grades earned—the typical school record contained the student's name, address, date of birth, place of birth, names of parents, dates of attendance, awards received, and other pieces of data. In other words, most information kept in a student's file, with the exception of the academic transcript, was directory information. In the past, student records were kept in paper file folders in a file cabinet in a school building's main office or in a school guidance counselor's office. Although limiting access to and ensuring the security of student records were priorities, they were not persistent concerns.

In most of today's information-driven public school systems, student records are computerized. A student's school record now contains directory information, but also personal information involving almost every aspect of a student's world, both in school and in his or her family life. In addition to academic data, a student's record might contain teacher comments, standardized test results and descriptive analyses of these results,

psychological and medical reports, anecdotal comments on student personality, descriptions of student disciplinary problems, and home and family data including, but not limited to, socioeconomic status.

Beginning in the mid-1970s, public school systems followed the mandates of federal and state law concerning students with educational disabilities. In today's public school systems, an important aspect of providing free, appropriate educational opportunities to qualified students involves the collection and storage of student-related information, and ready access to these data by both parents and school staff. However, the procedural requirements of federal law (Individuals with Disabilities Educational Act, plus appropriate federal guidelines), as well as state law and guidelines, must be followed.

In today's public schools, requests for student information—and sometimes student photographs—are constant. College recruiters, prospective employers, school staff members, federal and state agencies, lawyers and courts, the police, the military, parents (both custodial and non-custodial), guardians ad litem, the media, and others all want access to student information for a variety of reasons. As such, the relevancy and accuracy of data entered into a student's record, access to and security of personally identifying information contained in the record, and the permissible use of student and family data must be priority concerns of school administrators, counselors, faculty, and staff.

A student record no longer takes the form of a simple paper folder physically located in one office in a school building. By law, a student's educational record is defined as "records, files, documents, and other materials [directly related to a particular student] maintained by an educational agency or institution or by a person acting for such agency or institution" (Family Educational Rights and Privacy Act (FERPA), 1974). Because of the general nature of the definition, five important questions often arise: (1) What does the official school (educational) record consist of? For example, are school disciplinary records, medical and psychological records, and police arrest and juvenile court adjudication matters all kept in the same record? (2) Where is that record kept? In a file cabinet in the guidance

office? In a principal's office? On a computer? (3) Who is the official custodian of that record? (4) Who has the authority to correct or expunge the record? (5) How long should information be kept in the record?

Generally, legal and ethical issues involving student records fall into the following distinct categories: (1) access to records (including access by parents, public school staff, non-school-related third parties, and the student himself/herself) and related privacy protections (keeping information confidential); (2) content of records and the accuracy of individual pieces of data; (3) purging and expunging records; and (4) storing and destroying records.

Legal Considerations

Simply stated, the word privacy means the right to be "let alone." To put it another way, citizens can expect to be free in their persons and property from the intrusive acts of others, including the government. In today's public schools, this general expectation of privacy extends both to students and their families.

The U.S. Supreme Court has, in case law involving the application of other constitutional provisions (e.g., the Fourth, Fifth, and Ninth Amendments), created a place for privacy in the Constitution (*Griswold v. Connecticut,* 1965; *Mapp v. Ohio,* 1965).

As an alternative to a possible right of privacy claim, a lawsuit concerning student records might take the form of an allegation that an act by a school official or staff member violated state statutory law. In recent years, states have enacted privacy protection laws (separating private, personally identifying information from public information), including laws that specifically deal with scholastic records in public schools, as well as laws covering computer fraud.

Another alternative to a right of privacy action might be a tort claim (a civil action for money damages), especially one where defamation (injury to a student's or parent's character and reputation) is alleged. The twin torts of libel and slander are most often cited in this area of law. Could statements in a school record be interpreted as false, unwarranted, or malicious, with

injurious results? Could information in the record be misused? What if misinformation about a student is given and the student is not accepted into college, is passed over for a job, or is denied a scholarship? Could the conveying of the misinformation rise to the level of negligent misrepresentation?

Federal Law

Signed into federal law by President Gerald Ford, the Family Educational Rights and Privacy Act (FERPA) of 1974 deals mainly with federal funding of projects and programs in public educational institutions. Though FERPA does not confer any private rights (i.e. the right of a private citizen) to sue, the law makes it clear that federal funds will not be available to any state educational agency or institution if the provisions of the act are not met or are violated. State statutes and local school system policies incorporate the requirements of FERPA.

As applied to educational records (school records, scholastic records), FERPA contains the following mandates:

- Parents shall be given annual notice of their rights under FERPA.
- Parents shall not be prevented from seeing, reviewing, and inspecting the complete educational record of their child.
- Unauthorized third parties shall not be given access to a student's educational record.
- Parents have a right to challenge, in a hearing, the accuracy, truth, and relevance of the data kept in their child's educational record.
- No complete educational record or any portion of a student's educational record shall be released to any outside agency or person without prior written consent of the parent.
- No personally identifying information (directory information is exempt) about a student shall be released without prior written parental consent.
- A written authorization form signed by the parent shall be kept on file.
- Teachers and administrators at the school the student attends who establish a "legitimate interest" may gain access to a student's educational record.

• Students who have reached the age of 18 and are currently in attendance at the school may see their educational record.

• Students who may be subject to studies conducted by or on behalf of educational agencies or institutions shall not have their personally identifying information, or that of their parents, used by persons other than representatives of those agencies or organizations. When no longer needed for purposes of the study, all information collected shall be destroyed.

• All instructional materials used in connection with a research or experimentation program or project shall be available to parents or guardians of the students engaged in the study or project.

• No student shall be required, as part of any applicable program, to submit to psychiatric/psychological examination, testing, or treatment of which the primary purpose is to reveal such matters as political affiliation, mental or psychological problems, sex behavior and attitudes, or income (other than what is needed to determine eligibility for federal program benefits).

State Law

As a general rule, each state may expand and build upon the requirements of FERPA. For example, state laws specifically address the rights of non-custodial parents and accord them the same access rights to the school records of their children as custodial parents have, absent a court order to the contrary. State law might also grant access to school records to a third party designated by a parent or by a student who has reached the age of 18. Further, state statutes might allow for one school to transfer a student's entire school record to another school (public or private) when a student changes his or her enrollment.

In some states, the statutes might grant access to state and local law enforcement agents who are seeking information related to a matter under investigation. Other states might, in cases of suspected child abuse, grant access to agents of state and local child protective services departments.

Public school boards, administrators, and employees must apply appropriate laws in their respective states to matters related to student records.

Case Law Examples

Van Allen v. McCleary (1961). The courts has held that parents have a common law right to see their child's record.

Blair v. Union Free School District (1971). A confidential relationship exists between school authorities and students and, as such, school officials must protect against intentional or negligent divulgence of information to unauthorized third parties.

Merriken v. Cressman (1973). The fact that students are juveniles does not in any way invalidate their right to assert their constitutional right to privacy. A balance must be struck between an individual's right to privacy and the right of government to invade that privacy for the sake of the public interest.

Einhorn v. Maus (1973). School officials have the right to record and to communicate factual information about their students to institutions of higher learning.

Jacobs v. Benedict (1973). Expungement of a student's record is possible with the approval of the court.

Depperman v. University of Kentucky (1974). Comments about a student's "emotional fitness" might be actionable in a court of law.

Tarasoff v. Regents (1976). The duty of a school counselor, student advisor, or other school employee to keep information confidential gives way to the duty to warn when peril to someone's life or safety exists (e.g. when a student might share information that he or she is contemplating suicide or thinking of harming others).

Fay v. South Colonie Central (1986). Both parents, custodial and non-custodial, shall have access to their child's school record.

Belanger v. Nashua (1994). As a general rule, a school record includes all information in a student's file maintained by the school. Thus, information generated by a juvenile court but found in a student's school record is considered part of the school record.

Gruenke v. Seip (2000). Students are entitled to confidentiality regarding the possible disclosure to others of medical information that can be directly linked to them.

United States v. Miami University (2002). Student disciplinary records are a part of a student's educational record. As such,

student names and other personally identifying information are not subject to public release.

Sain v. Cedar Rapids (2001). A public school guidance counselor shares a special relationship with his or her students, creating a duty of reasonable care. School counselors must take care to provide students with accurate information and may be held liable where inaccurate information rises to the level of false misrepresentation of fact.

Daniel S. v. Board of Education (2001). A physical education teacher who told members of the cross-country team that he had kicked two students out of his physical education class did not, by those statements alone, create a violation of any privacy protections contained in FERPA, in part because the students already knew about the disciplinary incident.

C.N. v. Ridgewood Board of Education (2001). Parents challenged a student survey that examined attitudes toward relationships with parents, drug and alcohol abuse, destruction of property, and sex. The court held that the accessibility and privacy of student records sections of FERPA had not been violated.

Owasso I.S.D. v. Falvo (2002). The U.S. Supreme Court unanimously held that a classroom teacher's routine practice of allowing students to grade each other's homework papers, quizzes, and tests in class (students exchanged papers, names were not hidden from the view of the student grader, answers were read aloud, and grades were given) did not constitute a violation under FERPA. However, the Court did not decide whether or not individual student grades turned in and recorded by a teacher met the definition of an educational record.

Gonzaga University v. Doe (2002). The U.S. Supreme Court ruled that FERPA, even when coupled with 42 U.S. Code, Section 1983 (the section of the U.S. code that gives citizens the right to sue state agencies), does not give private citizens the right to sue under FERPA. The authority to enforce the requirements of FERPA vests in the U.S. Secretary of Education.

Policy Considerations

To make legally sound decisions in situations involving student educational records, administrators must apply the policies of their local school board. Prior to acting on such matters, consider the following questions:

- Does the school board have a specific policy addressing student records?
- How does the policy define the term *student record* (sometimes called *educational record* or *scholastic record*)?
- How does the policy define the terms *directory information* and *personally identifying information*?
- Does the policy clearly enumerate the rights of parents and students and are these rights conveyed in some form to parents and students?
- Does the policy specify items that are not considered part of a student record (e.g., administrator and teacher working papers, letters of recommendation)?
- How does the policy specifically address prior consent for access and review of student information?
- Does the policy include a list of items not available to students who have reached the age of 18 (e.g., parent financial information, comments of teachers and other personnel)?
- How does the policy treat access by parent designees and outside third parties?
- How does the policy treat access by school administrators, teachers, and staff?
- Does the policy address the release of student information to law enforcement? The press?
- Does the policy specify time, place, and manner of review of records?
- Who is designated as the official custodian of the record (e.g., building principal, guidance director, director of pupil personnel)?

- Where are official school records stored?
- Are computerized and other electronically stored student records specifically addressed?
- Are special education, medical, and psychological records stored separately from other student records?
- Are criminal incident reports and juvenile adjudication reports included in student records maintained by the school system?
- How does the policy treat release of student information in emergency situations?
- How does the policy treat the correction of information, purging of records, and the length of time student records will be kept?

Practical Considerations

Franklin should advise Nancy to consider the merits of each request separately. He should also remind her that federal law (FERPA), state law, and local school board policy contain specific provisions covering student scholastic records. To be in compliance, she must carefully review all appropriate materials prior to responding to each of the three requests.

Regarding Mrs. Willingham's request to review her son Bradford's educational record, Franklin sees no problem. She should be allowed to see the record as it relates to Bradford's academic progress toward graduation. However, since there may be a potential issue involving Mrs. Willingham's former husband, Bradford's father, requesting access to his son's record at some future time, Nancy will need to be cautious. In Franklin's opinion, Nancy must assume that Mr. Willingham, even though he is the non-custodial parent, has a right to see his son's educational record, absent official documentation to the contrary. Franklin should advise Nancy to telephone Mrs. Willingham and set up an appointment to gather more information regarding the custody arrangement and the rights of each parent as specified in the divorce decree.

As to Officer Draper's request, because Eileen Dean's record is now part of an active criminal investigation, Nancy cannot

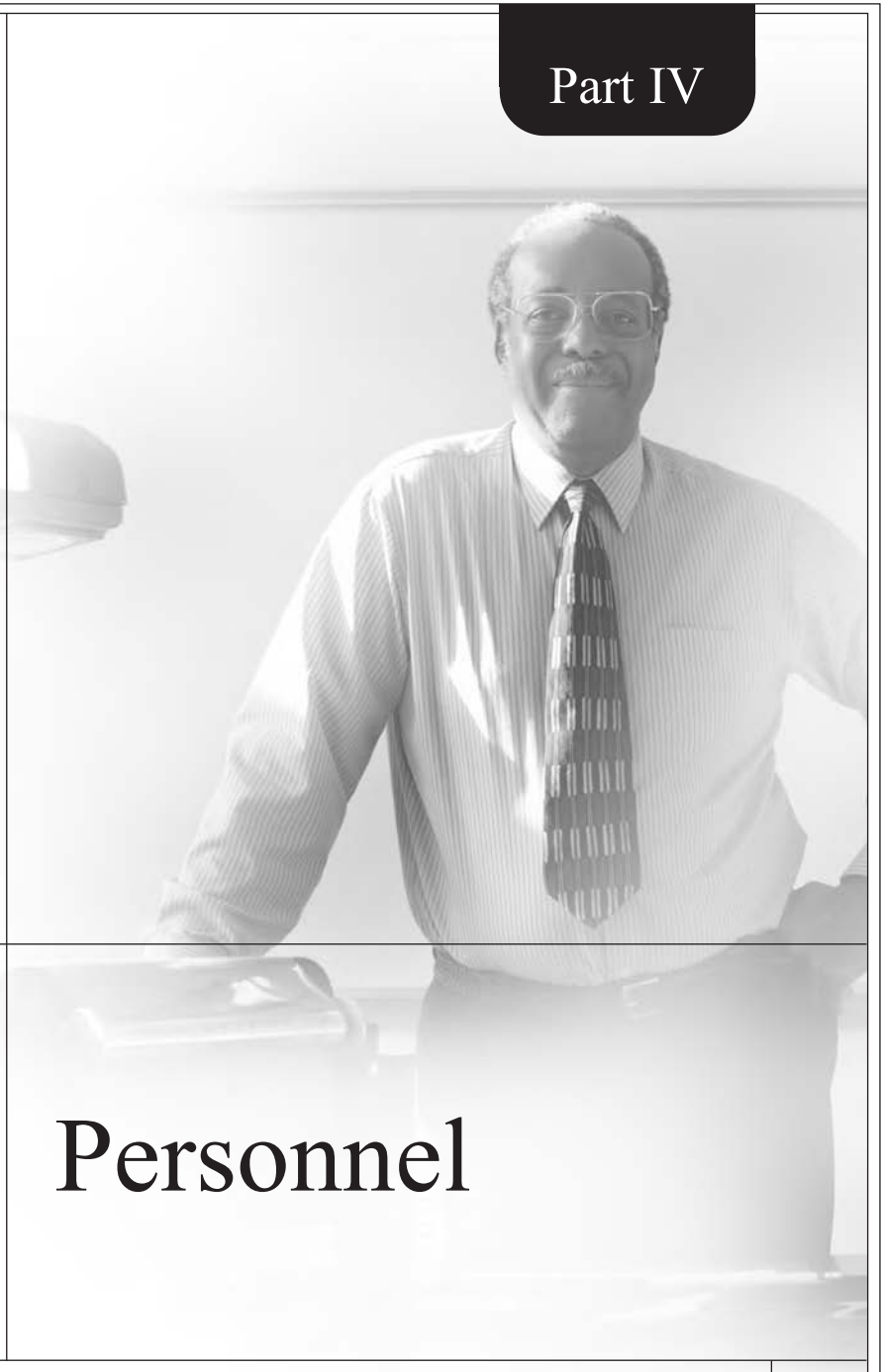
deny access, and prior parental notice or permission is not relevant. However, Franklin must caution Nancy to set a date and time for the review that is convenient to her schedule and to insist that Officer Draper review the record in the guidance and student personnel office, with either Nancy or one of her staff present. In addition to insisting that Officer Draper bring proper identification to the meeting, Nancy should narrow the focus of the review. She should require Officer Draper to send, prior to the meeting, a list of the specific sections of Eileen's record (e.g., disciplinary record, academic record, and attendance record) that she plans to examine. In Franklin's view, this last point is a must.

Regarding the request made by Scott Ferguson, the 9th grade English teacher, Franklin's advice is to deny it. In Franklin's words, Nancy should "simply and politely say, 'No!'"

Postscript

The student's "permanent" record, as frequently noted, is a file that may be accessed by the school and the student's parents or guardians. Even scholastic records for college admission are forwarded with the family's permission. Although some states have crafted laws that permit certain types of discipline records to be transferred, the file should be limited to those who create and maintain it. Where law enforcement or social service agencies need information, a court order may be appropriate. As a note of caution, do not set up duplicate "working" files with anecdotal information; they will be useless in any formal proceeding.

Part IV



Personnel

Chapter 11

Personnel Evaluation

In early July, David Chen is delighted to receive notice of his appointment as the new principal of Grant Middle School. He knows, however, that the job will present him with a major professional challenge. Over the last three years, Grant students have received the lowest scores in the school system on the statewide tests of student achievement. Grant students scored far below students enrolled in the other four middle schools in Smith County. Grant Middle School's accreditation is in serious jeopardy. The school board, superintendent, and parents expect the situation to improve without delay.

In late August, David is called to a meeting with Dr. Joyce Krauss, assistant superintendent for instruction. In the meeting, Dr. Krauss makes it very clear that David is expected to have a positive and immediate influence on the academic environment at Grant Middle School. She tells him, "We expect you to turn it around right away. You will have my backing for every instructional decision that you believe is necessary, especially where staffing changes are concerned. If there are teachers who are not providing quality instruction in their classrooms, let me know who they are, give me the documentation that I need, and I will see to it that appropriate action is taken. All that the school board and superintendent will need is my recommendation. The board is pressuring the superintendent, and the superintendent has placed the responsibility on me to turn the situation at Grant

around. The ball is in your court, David, and I am counting on you to move things forward in a positive direction."

Three months into the school year, David is ready to recommend the dismissal of two classroom teachers, effective the end of the first semester. He is convinced that the removal of these teachers is in the best interests of their students. As he composes his recommendations to Dr. Krauss, David reviews his notes on each teacher.

Teacher #1 has served in the school system for 35 years and holds a tenured position. He is a certified mathematics teacher and has been teaching 7th grade math for the past five years. Prior to three years ago, his evaluations were excellent, but his performance in the classroom has been less than satisfactory for the last two years. During the first semester of this year, he sent more students to the office with disciplinary referrals than any other teacher. At least two complaints from parents have been received every week of the current semester, all of which took issue with his lack of classroom control. The parents claim that their children are not learning because of disruptions and a lack of discipline in the classroom. Teacher #1 has been formally visited in his classroom three times during the current semester, and each resulting evaluation was negative in every aspect. When the results of each evaluation were shared, Teacher #1 reacted with extreme hostility and has openly complained about the instructional evaluation system at faculty meetings. In his opinion, the principal is harassing him.

Teacher #2 is new to the school system and is in her second annual contract as a 6th grade English teacher. In her brief professional career, Grant Middle School has been her only teaching assignment. Although her classroom teaching has been evaluated as more than satisfactory, her attendance is a problem. On several days, she has reported late for work; she has left the school building early on required teacher work days; she refuses to accept after-school assignments at ball games and other student functions; and on more than one occasion, she has left her classes unattended to go to the teachers' lounge to make telephone calls. She has been warned to cease these behaviors, but they have continued. Recently, two students complained to their

counselor that Teacher #2 is assigning poetry readings filled with profanity and obscene words.

Having looked over his notes, David begins to compose his summative statements to Dr. Krauss. What should he say and how should it be said? How much documentation should be included?

Background Discussion: Personnel Evaluation

The underlying purpose of personnel evaluation in public school systems must be to improve instruction for students. Legally, personnel decision making is the exclusive prerogative of local boards of education and their administrative agents. As a general rule, local school boards and their administrative officers are presumed to be acting in good faith and are vested by state law with the legal powers and authority to make all employment decisions.

Public school system employees can be divided into two primary categories: professional (certified and/or licensed) employees (e.g., superintendents, principals, classroom teachers, counselors) and support personnel (e.g., secretaries, custodians, cafeteria workers, school bus drivers). Within the professional employee category are those employees who may have acquired tenure/continuing contract status, a standing created by state law. In some states, tenure (or continuing contract status) is not available to administrative personnel, such as superintendents, supervisors, and building principals. The constitutional protections and legal rights of these individuals differ from those of other professionals employed on annual contracts or temporarily on a substitute basis.

Once a required probationary period (generally three years duration) is served and tenure is granted by a local school board, employees who have gained this status must be given notice of non-renewal or dismissal on or before a specific date, and cause must be specified. Finally, the tenured employee must be afforded some type of hearing where the cause of non-renewal or dismissal is explained or elaborated. In some states, however, tenure/continuing contract status has been abolished by legislative action.

The following sections address performance evaluation parameters for several types of education personnel:

• Superintendents of Schools. As a general rule, a local superintendent of schools does not have tenure. The superintendent is contracted with and works directly for a local board of education. It therefore follows that the evaluation and performance appraisal of a local school superintendent is closely associated with the superintendent's role as a local school board's chief administrative officer. Traditionally, the determination of a superintendent's job effectiveness has been, and remains, the legal prerogative of the school board, based upon job expectations and performance criteria set by the board. The retention of a school superintendent has been, and remains, a matter of contract law. In some states (Virginia, for example), however, recently enacted statutes require the formal evaluation of local school superintendents using a diverse collection of data, including, but not limited to, community, parent, and employee surveys regarding the performance of the superintendent.

• Administrators. Until recent years, the evaluations and performance appraisals of central office administrators and building principals have been responsibilities directly associated with the role of the local superintendent of schools. The rationale for this is clear; the superintendent must be free to select and place key people in positions on his or her administrative team. Further, the superintendent must be free to remove and replace members of the administrative team when the need arises. In contemporary public school systems, however, performance evaluation of administrators, including building principals, now involves the collection and analysis of data from a variety of sources (e.g., colleagues, employees in the administrator's unit, parents, community, and, where appropriate, students). In light of the fact that statewide student achievement data are being used more frequently to compare schools—and the accreditation of each school is becoming increasingly linked to student testing results—this source of data will undoubtedly become a major factor in the evaluation and performance appraisal of administrators, especially the building level principal.

• Teachers and Other Employees. Over the past 30 years, courts of law, both federal and state, have heard numerous public school employment cases. Not all cases have involved the professional performance of classroom teachers and school administrators. Some have focused attention on employee behavior outside of school. Additionally, court cases have involved school system supervisors, school counselors, school psychologists, school social workers, coaches, school bus drivers, and others. A major result of these court decisions has been the creation of a clear balance between the legal prerogatives of school boards and school officials, and the legal and constitutional rights and protections of employees, both in their personal and professional lives. As a general rule, to defend a nonrenewal or dismissal decision regarding an employee, a nexus must exist between employee behavior—whether exhibited in the school building or outside the workplace in the employee's private life—and the educational development and personal welfare of students and other staff members.

• Criteria for All Personnel. All employment decisions, whether they involve superintendents, principals, teachers, or support personnel, must be built upon and supported by job-related criteria. Even in states where the doctrine of "employment at will" still exists, local school boards and their agents must be ready to demonstrate and document both the substantive soundness and procedural fairness of every employment action. To survive judicial scrutiny, employment decisions must (1) not violate constitutional law, (2) be legally sound, (3) not be arbitrary, (4) be consistent with the school board's own policy requirements, and (5) be built upon solid documentation. A crucial aspect of mounting a successful defense is the use of personnel evaluations of professional performance (sometimes referred to as employee professional assessment) as the primary source of direct evidence.

In some contemporary public school systems, peer evaluation is used as part of the employment decision-making process. Where a peer evaluation process exists, care must be taken to select and match peer evaluators to the employees being evaluated. To pass legal scrutiny, employees being evaluated must

have prior knowledge of the identity of the peer evaluators selected, have a chance to challenge negative evaluations, and be helped to understand the peer evaluation process. Peer evaluators must be trained in the techniques of evaluation, be helped to understand the evaluation process's criteria, be assisted in following the evaluation procedure's required steps, and be reminded that their work must be kept confidential. Though an integral part of the total evaluation process, peer evaluation results should not be the sole criterion for measuring the effectiveness of an employee.

Legal Considerations

The Fourteenth Amendment to the U.S. Constitution states, in relevant part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Over the years, the U.S. Supreme Court has made the guarantees of the Fourteenth Amendment applicable to public school personnel (*Board of Regents v. Roth*, 1972; *Cleveland Board of Education v. Loudermill*, 1985; *Meyer v. Nebraska*, 1923; *Mt. Healthy v. Doyle*,1977; *Perry v. Sindermann*, 1972).

Three decades ago, the Supreme Court handed down a decision having a direct impact on personnel evaluation. Emerging from the Court's decision were the following three questions, each of which plays a role in school personnel evaluation in today's schools, both public and private: (1) What relationship, if any, exists between employment requirements specified in a job description and job performance? (2) Do methods of evaluation and the criteria used to judge job effectiveness actually relate to job success? (3) Can an employer demonstrate a connection between job requirements, job performance, and job success? An important result of the application of these questions to public school personnel decision making was the removal of artificial and unnecessary measures of employee on-the-job performance. In essence, employee evaluation/appraisal

procedures in public school systems became much more sophisticated and detailed.

Professional personnel in public school settings must be evaluated/assessed on the basis of professional qualifications plus on-the-job performance. To make the entire process fair and reliable, job performance evaluation in today's public schools must: (1) be procedurally sound; (2) rely on valid, reliable, and objective job-related criteria; (3) involve those who are being evaluated; (4) be consistently carried out by trained evaluators; and (5) be intended to improve employee performance in an effort to expand the educational opportunities of students.

Federal Law

In addition to constitutional claims (i.e., Fourteenth Amendment claims), there are several federal statutes that could apply in situations where allegations of discrimination and/or retaliation in personnel evaluation exist. The following is a partial list of federal statutes often relied upon by plaintiff employees:

- The Civil Rights Act of 1964, Title IV, which forbids unlawful employment practices based on race, color, religion, sex, or national origin.
- The Equal Pay Act of 1972, which forbids discrimination in payment of wages between employees who work at comparable jobs where performance requires equal skill, effort, and responsibility.
- The Americans With Disabilities Act of 1990, which forbids an employer from discriminating against an employee solely on the basis of his/her disability, and requires that employers make reasonable accommodations for employees covered by the ADA.

State Law

As a general rule, personnel evaluation and employee performance appraisal are matters of local school board policy. However, local school board policies must comply with the requirements of state statutes. Whereas some states do not specifically require employee evaluations, other states (for example, Virginia) have specific statutes setting guidelines for performance standards and evaluation criteria. In this era of

accountability, these legislatively created standards and criteria apply to and, indeed, require the evaluation of all professional employees (e.g., superintendents, central office administrators, supervisors, principals, and classroom teachers). Further, the application of technology allows school officials to make connections between the performance of individual classroom teachers and the testing profile of students they have instructed.

State statutes that provide for tenure or continuing contract status also have an effect on policies dealing with personnel evaluation. By and large, these statutes require, along with procedural due process, a showing of cause for dismissal, which is usually stated in general terms (e.g., incompetence, immorality, insubordination, unprofessional conduct, and just cause). Thus, the need to provide substantive documentation in an effort to build a case for dismissal is critical. Documentation established through systematic and procedurally fair personnel evaluations is a building block of success in defending an employee dismissal decision.

Case Law Examples

Meyer v. Nebraska (1923). The U.S. Supreme Court opined that "education of the young is only possible in schools conducted by especially qualified people who devote themselves thereto." A teacher's "right to teach and the rights of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] amendment."

Beilan v. Board of Education (1952). The term *incompetence* as it applies to public school teachers must be broadly interpreted. Teacher competence involves more than a mastery of one's subject and one's classroom performance. Teacher fitness for employment must be measured by a variety of factors.

Board of Regents v. Roth (1972). A teacher with tenure is entitled to continued employment "during effective and good behavior." A teacher who has not acquired tenure status is entitled to nothing more than his/her one-year contract. The Fourteenth Amendment's liberty and property interest protections—and accompanying procedural due process—only apply to

employees who have more than a unilateral expectation of continued employment.

Scheelhaase v. Woodbury (1974). The failure of students to achieve specific levels of performance on standardized tests can be considered in making an employment dismissal decision involving a specific teacher. The improvement of student test scores was an objective of the school board, and the teacher failed to produce the results expected of her.

Cleveland Board of Education v. LaFleur (1974). A school board's interests in teacher fitness and in preserving instructional continuity are legitimate. However, teacher termination decisions must not rest on presumptive conclusions regarding an employee's ability to carry out her job responsibilities. A link must exist between an employee's physical condition and her ability to discharge her job functions.

Gish v. Board of Education (1976). One cannot measure a teacher's fitness "solely by his or her ability to perform the teaching function and ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency."

Mt. Healthy v. Doyle (1977/1981). The following standard is applied in situations where a plaintiff employee alleges that an employer's adverse decision regarding him or her is either constitutionally or statutorily flawed: (1) Is there present in this situation some element or exercise of protected conduct? (2) Did this element or exercise play a "substantial or motivating part" in the board's decision? (3) Absent (1) and (2) above, would the same decision have been made regarding this employee?

Cleveland Board of Education v. Loudermill (1985). A pretermination hearing must be granted to an employee who possesses a property interest in employment. A pre-termination hearing provides an opportunity to be sure that reasonable grounds, and evidence to support those grounds, exist to support a proposed employment decision. In doing so, mistaken decisions are avoided.

Board of Education v. Van Kast (*1993*). With building principals, as with teachers, it is important to provide both a warning when deficiencies in work performance are identified and a

period of time within which to remedy the deficiencies.

Lansing Association of School Administrators v. Lansing Board of Education (1996). Personnel evaluation results may be subject to a state's freedom of information statute. Thus, the following questions are appropriate when a request is made by third parties to see personnel evaluation records: (1) Does state law either allow for or preclude the disclosure of public school employee performance evaluation records? (2) Will the release of such information cause harm to the employee's reputation? (3) Does the release of such information involve an employee's right to privacy?

Gilliand v. Board of Education (1997). If a nexus exists between the behavior of a staff member and potential harm to other staff or to students, school officials must decide whether or not the behavior is remediable or not. If remediable, a remediation plan should be devised and implemented.

Collins v. Faith School District (1998). In general, teacher incompetence is established by demonstrating a pattern of unacceptable work-related performance evaluated over time, rather than by one isolated incident.

Glover v. Williamsburg Board of Education (l998). Where no criminal prosecution exists, the Fourteenth Amendment's equal protection guarantee is violated when a teacher is fired solely because he is gay.

Lemire v. Silva (2000). Where a school system employee is fired, and the employee alleges violations of the Americans with Disabilities Act and establishes standing under the ADA, an employer must be ready to demonstrate a direct connection between the employee's disability and his or her failure to meet essential work performance requirements.

Rivera v. Community School District (2001). A non-tenured teacher was fired for, among other things, helping students on standardized mathematics and reading tests. In addition to finding no property interest present, the court also held that the teacher's pre-termination hearing regarding the "cheating" allegation was sufficient to protect her reputation.

Miller v. Houston (*2001*). A continuing contract teacher with over 20 years of teaching experience (16 of which produced a

record of perfect attendance) was terminated because of her failure to report to work for three months. Her refusal to report to work was done as a protest of her transfer to another teaching location. The court considered this "good cause" for termination.

Nye v. Roberts (2001). The court held that a substandard performance evaluation, which had as its purpose the improvement of performance and not termination, and a letter of reprimand requiring the employee (a school psychologist) to correct the professional behavior referenced in the performance evaluation, did not constitute an adverse employment action by the employer.

Nichols v. Harford County Board of Education (2002). The court found in favor of a public school principal who had sent a letter of reprimand to a teacher who suffered from an anxiety disorder. The letter required, among other things, that she cooperate with a substitute teacher. The letter specified that any future failures to follow administrative directives would be considered "gross insubordination" and would subject her to disciplinary action.

Policy Considerations

It is vitally important that personnel evaluation be placed within the context of local school board policy. While local school boards are bound by the requirements of state statutes on point, the policies and implementation procedures that actually create personnel evaluation systems vary from one local public school system to another. Thus, it behooves school administrators to be knowledgeable about their particular school system's personnel evaluation policies. Consider the following questions when evaluating such policies:

- Does the school board make it clear that personnel decision making is within its exclusive legal authority?
- Does the school board have a specific policy requiring evaluation (sometimes called personnel assessment or professional appraisal) of school system personnel?
- Does the policy make it clear that the purpose of personnel evaluation is to: (1) improve and enhance the quality of

instruction to all students, (2) maintain a safe, disruption-free learning environment, and (3) hold all personnel accountable for the accomplishment of (1) and (2)?

• Does the school board policy require evaluation of both professional personnel (e.g., those holding national and/or state certification, or special licensure) and support personnel (e.g., bus drivers, clerical help, teacher aides)?

• Does the policy specifically require evaluation, by position, of the school superintendent, building principals, classroom teachers, school counselors, central office personnel (e.g., supervisors), and others?

• Does the policy require evaluation by trained evaluators, using various sources of evaluation data (e.g., work setting observations, student test scores and grades, student work products, parent feedback, peer evaluations, disciplinary record, work attendance, anecdotal material, and employee work products)?

• Does the policy require the production, documentation, and storage of various data sources?

• Does the policy specify work-related expectations for the performance of the superintendent, school administrators, classroom teachers, supervisors, and others?

• Does the policy require the briefing of each employee regarding specific work-related expectations?

• Does the policy require the initial involvement of each employee in setting personal goals and expectations of job performance, including how, when, and by whom these will be evaluated?

• Does the policy require various phases (including frequency and duration) and levels of evaluation for probationary personnel, tenured personnel, administrators, and support personnel?

• Does the policy require that notice of deficiencies be given to the employee by a certain date or within a specific timeframe?

• Does the policy require remediation of and timelines for the improvement of employee performance if/when deficiencies are identified?

• Does the policy state the consequences of unacceptable work performance, the designation, by position, of the individual

responsible for making a recommendation to the school board regarding the future employment status of the employee, and next steps to be taken, including, but not limited to, dismissal from the school system?

• Does the policy specifically address the potential consequences of employee behavior outside the workplace that is illegal or antithetical to the school system's mission and goals (e.g., drug use, domestic violence, child abuse, sexual assault, illegal weapons violation, and others)? For example, does the policy include a statement that such behavior will lead to automatic dismissal?

Even though the pressure is on to quickly remove any poorly performing teachers, the first step that David must take with both teachers is to refresh his knowledge of the school system's personnel evaluation process. If David is an administrator in a state where collective bargaining exists (i.e., where unions, on behalf of teachers, administrators, and support employees, negotiate contracts), he also must adhere to the substantive and procedural requirements contained in the collective bargaining agreement. In sum, he must make certain that his actions are both substantively and procedurally sound in each case.

As a second step, David should once again review the material contained in the files of both Teacher #1 and Teacher #2. Even though Teacher #2 is new and non-tenured (in such cases a simple notice of non-renewal generally satisfies legal requirements), careful attention must nonetheless be paid to the documentation of evidence that will underscore his summative evaluations, since both Teacher #1 and Teacher #2 will be dismissed from their jobs during the duration of a contract.

In his review, David should look for evidence that both teachers received immediate notice of any parental, student, or colleague complaints about their performance, as well as evidence that each complaint was investigated and verified. He will also want to make sure that all required timelines have been met. Dates of classroom visitations and administrative conferences; verification of any steps taken in the past to remediate unacceptable performance, including any specified expectations for improvement; and evidence that each teacher received

immediate feedback regarding the improvement or lack of improvement in their performance must be included.

If the files contain the above documentation, David should put his dismissal recommendations in writing to Dr. Krauss and send them without delay.

Practical Considerations

When it comes to personnel issues, "doing it right" is frequently more important than "being right." The greatest pressure for any administrator comes not from making a tough employment decision, but from having that decision overturned in an administrative hearing with the superintendent or the school board, or in a court of law. While colleagues always have the right to know why a decision was made, avoid candid and off-the-record talks that may later be used in an appeal. The goal when dismissing an employee is to do it in such a way that the person being dismissed can leave with dignity and a clear sense of why their performance was unacceptable.

Postscript

The primary purpose of personnel evaluation is improvement. Following an evaluation conference, a teacher may leave a principal's office with a number of opinions and feelings about the meeting. He may dismiss the evaluation entirely, thinking, "The principal didn't even observe me, so how does he know what I'm doing?" Similarly, he may feel that the principal, though well intentioned, doesn't know or understand the subject being taught and therefore cannot make a fair assessment. Or, he may think, "I don't agree with everything that was said, but the evaluation basically reflects the way I am." Only the third view offers any hope for a change of behavior. The evaluation process must be clearly understood, consistent in application, and "owned" by those it affects.

Chapter 12

Governmental Immunity

It's an exciting Friday night at Westlake High School. The football team is playing a home game against cross-town rival Central High School. Both teams are undefeated and Westlake's stadium is filled to capacity with fans. School spirit is high, the school bands are playing with gusto, and the cheerleaders are performing at their best.

Parker McCabe, Westlake's principal, is thrilled with the turnout of students and parents. He estimates the total attendance in the stadium to be 4,500. Parker is seated next to Wilma Watson, the superintendent of schools, and Morgan Seaton, a member of the school board, who remarks that the size of the crowd demonstrates a need to replace the 30-year-old stadium bleachers. Wilma agrees and adds that she doesn't know how so many fans can be accommodated in bleachers with a capacity of only 3,500 people.

Midway through the second half of the game, with the score tied, the cheerleaders from both teams lead the crowd in a cheer. The cheer calls for fans in opposing sections of the bleachers to stamp their feet as hard as they can on the metal floor, jump up and down in unison, and "out shout" the opposing team's fans by yelling, "Victory is ours! Victory is ours! Victory is ours!" The cheer goes on for approximately five minutes.

Suddenly, a cracking sound cuts across the stadium, followed by an equally loud thud as a bleacher section on one side

of the field crashes to the ground. After a stunned silence, screams and cries can be heard. There seems little doubt that several people are injured.

Parker, Wilma, and Morgan—along with teachers, coaches, players, and local police officers on duty—rush across the football field to help.

Background Discussion: Governmental Immunity

In situations where allegations of official misconduct are made against local school boards and their agents in a civil suit, governmental immunity (sometimes referred to as the doctrine of sovereign immunity) is often invoked. The doctrine of governmental immunity is, as a general rule, available to local public school boards as corporate entities. Unless the state legislature has abolished it or in some way created limitations or exceptions to it, judges have usually accepted and applied this doctrine, especially in matters where the official discretion of a local public school board or its agents is at issue.

Governmental immunity covers only the official governmental functions of the school board. Governmental immunity does not extend to individual members of the board acting on their own, and is most viable where the board is alleged to have acted negligently. Whereas some states have either abolished or strictly limited governmental immunity in recent years, other states have, either by legislative action or court decisions, extended the doctrine to local school superintendents, building principals, and classroom teachers. Though school boards are not, as a general rule, liable for the negligent acts of their employees, superintendents, principals, and teachers may be covered by the board's immunity shield. So long as they have acted within the scope of their job, exercised sound professional discretion, have not acted with malicious intent, have not been reckless in the performance of their duties, and have not been grossly negligent, the school board's governmental immunity is available in a civil suit.

Legal Considerations

The Tenth Amendment to the U.S. Constitution reads, in relevant part, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution's silence in regards to education and schools has placed the legal responsibility for public education in the hands of each state (*Pierce v. Society of Sisters*, 1925).

As a matter of law, the legislative branch of each state possesses authority, under that state's constitution, to establish, maintain, supervise, and control public schools. It follows that states organize and subdivide themselves, for administrative purposes, into local school districts, and delegate a good share of the educational policymaking duties for the day-to-day operation of the public schools to local boards of education. In essence, the state creates an agent—a local school board—and vests legal authority in that board to provide for the education of all children of school age. So long as a school board is properly carrying out its state—that is, governmental—function, it shares in the state's immunity from civil suit.

Federal Law

Some issues involving local public school boards might find their way into a federal court and a school board might claim some form of immunity as a defense (e.g., Eleventh Amendment immunity in a civil rights action taken under 42 U.S.C. 1983). However, because the possible application of governmental immunity in court cases where negligence is alleged remains in state court, public school administrators must refer to the laws of their state to determine whether or not governmental immunity is available to them.

State Law

In recent years, several states have passed what are referred to as tort claims acts. In essence, a tort claims act can (1) keep a

local school board's immunity intact, (2) abolish a local school board's immunity, (3) limit the board's immunity to certain types of situations (e.g., school bus accidents), or (4) extend the board's immunity to its agents and employees. As a general rule, such laws also specify who can bring such an action against a local school board and the time frame (statute of limitations) within which such a suit must be filed. Local school administrators should rely on the laws of their state as a major resource.

Finally, it is wise for school administrators to check any insurance policies held by their school system that cover situations where injuries are suffered by staff, students, parents, and other parties on school grounds and/or in attendance at school-sponsored events. The potential effect of insurance coverage on governmental immunity (e.g., whether or not purchase of insurance waives the board's immunity) cannot be overlooked.

Case Law Examples

Morris v. School District (1958). A distinction can be made between the governmental functions of a local school board and proprietary functions, where immunity does not attach. Proprietary functions are those that a school board is not required by law to carry out, those that can be carried out by a commercial entity, or those solely intended to make money.

Molitor v. Kaneland (1959). In a jurisdiction where governmental immunity applied by law to local school boards, a state court nonetheless held that liability should naturally flow from negligence, and individuals or agencies (including public school boards) responsible for that negligence should be held liable for any injuries suffered.

Banks v. Sellers (1982). A state court held that a local superintendent of schools is a supervisory official who exercises powers involving a considerable degree of judgment and discretion. Therefore, a public school superintendent, by virtue of his/her job responsibilities, is entitled to share the local board's sovereign immunity.

Lentz v. Morris (1988). A teacher who has acted within the scope of his or her employment, has not been charged with gross negligence, and has engaged in an exercise of professional

discretion and judgment in his or her classroom, is protected by the doctrine of governmental immunity from liability for injuries suffered by students.

Montgomery v. City of Detroit (1989). In a suit brought by the parent of a 14-year-old male student who died of a heart attack in a physical education class, the court held that a principal's decision not to provide emergency procedures or train his teachers to make emergency calls was discretionary in nature and thus entitled him to immunity from liability.

Coffee County School Dist. v. Snipes (1995). School officials and employees who perform ministerial duties are entitled to governmental immunity where there is no evidence of actual malice or intent to injure someone.

Shedrick v. William Penn School Dist. (1995). In a case involving a woman who was injured when she slipped and fell on a floor in a public high school, the court held that school districts are protected by governmental immunity. An exception to immunity exists where an artificial condition or defect of the land creates an unsafe condition that facilitates the injury.

Linhart v. Lawson (2001). The court held that the state had abrogated governmental immunity for acts of simple negligence up to the limits of the school board's insurance policy.

Tollett v. Orleans Parish School Board (2001). State law extends immunity to local school board members for all policy decisions, unless the decisions are the result of willful and wanton misconduct. The immunity shield extends to school board members both individually and as a corporate body.

Cotton v. Paschal (2001). State law provides immunity for a school bus driver where the actions taken by the bus driver fall within the scope of her job.

Policy Considerations

It is important for public school administrators to consider local school board policy when determining the applicability of governmental immunity to situations where someone is alleging negligence as the proximate cause of injury. Assuming that the state where the injury occurred has not abolished governmental

immunity, the following questions provide a guide for probing local policy:

- Does the policy make it clear that the board, its agents, and its employees intend to maintain safety in every school building, on school property, and at school-sponsored events?
- Who is designated (by title) as responsible for maintaining safety in school buildings, on school property, and at school-sponsored events?
- What does the policy say about maintenance of all buildings and grounds?
- What does the policy say about maintenance of all school buses and other school system-owned vehicles?
- What does the policy say about supervision and control at all school-sponsored events, both on and off school grounds?
- What does the policy say about school board relationships with local police agencies in matters of control in school buildings, on school grounds, and at school-sponsored events?
- What does the policy say about charging rental fees for use of school buildings and other property, or charging admission to the public to enter school events?
- What does the policy say about the school board's expectations for safety and the responsibilities of outside groups to maintain safety when those groups use school buildings and other property?
- Does the policy encourage all employees to use their professional discretion, but also caution them that actions taken by employees must be within the scope of their job?
- Does the policy allow for and provide insurance coverage for all employees working in situations where injury to students, staff, and parents or other third parties might occur?
- Does the policy contain any disclaimer of liability on the part of the board?

Practical Considerations

In the long term, this matter is one more appropriately handled at the school board and central office levels, with the direct involvement and advice of the school board attorney. However,

as principal, Parker does have the immediate responsibility to do what he can to take charge of the situation in the football stadium.

As the principal, Parker must assume leadership in seeing to it that all staff members at the game cooperate with the police officers present to maintain order and to keep the fans from panicking. He should make use of the public address system to request the cooperation of the fans not involved in the collapse of the bleachers. With the help of a police officer, an immediate 911 call must be placed to the local fire department and rescue unit. Meanwhile, the superintendent or the school board chair should place a call to the school board attorney. At the same time, Parker, his staff, and the police officers must do what they can to survey the damage, secure the area, and assess possible injuries suffered by fans who were sitting on the bleachers when they collapsed. In addition, Parker must, with the cooperation of the police, get the names of any witnesses to the incident.

Obviously, the football game cannot continue and the athletes, cheerleaders, band members, and others must be assisted in their transition from the stadium to their homes. Parker should see to it that they, and their parents, are accurately informed of what has happened before they are sent home.

As soon as possible, Parker and the superintendent should meet with the media to provide an accurate account of the incident. This meeting should not take place, however, until Parker and the superintendent have met with the school board attorney. They should also meet with the relatives of those who were sitting in the collapsed section of the bleachers.

First thing Monday morning following the incident, a meeting should be held at the central office to consider what steps are to be taken. What happens next is the prerogative of the school board and superintendent, based on advice from the school board attorney, but whatever is decided, Parker should cooperate fully.

Postscript

As with any organization, a school has a compelling responsibility to find liability when an incident occurs, but its main focus should always be safety. School personnel have historically been responsible for appropriate instruction, supervision, maintenance of equipment, and foreseeing of any imminent threat or danger. In other words, the primary responsibility of school personnel is to ensure, to the best of their ability, that incidents resulting in the injury of students, staff, and parents or other third party individuals do not happen in the first place. As such, the issue of liability is best left to attorneys and risk managers.

Part V

Accountability

Chapter 13

Educational Malpractice

Anita Patil is the new principal at Academic Village Elementary School. During the first week of the school term, she meets with four parents who are officers in a newly organized group called Parents for Academic Excellence (PAE). Dalton Bidwell, the father of Paul Bidwell, a 4th grade student at Academic Village Elementary, is the group's president.

During the meeting, Dalton tells Anita of PAE's intent to see to it that every student enrolled at Academic Village Elementary receives a quality education. He proudly states, "We have a tradition of excellence in this school, and we expect that no student will be left behind academically." When Anita asks how progress toward that goal will be judged, Dalton responds, "We will monitor the results of the newly implemented statewide student competency examinations. If students at Academic Village Elementary fall below acceptable cut-off scores, it will be considered evidence of educational malpractice. PAE plans to hold you, the instructional leader, and every one of your classroom teachers accountable for the test results."

As the four parents prepare to leave her office, Anita begins to ponder the ramifications of Dalton's warning. "Can I be held liable if our school loses its accreditation because of our test scores?" she wonders. "Will our classroom teachers be liable if their students fail to learn what the state requires? Is there such a thing as educational malpractice?"

Background Discussion: Educational Malpractice

Simply stated, the term malpractice means "bad practice." As a general rule, legal claims of bad practice filed against public school personnel are more consistently found in tort law and involve allegations of professional negligence (i.e., failure to exercise reasonable care under the circumstances). In situations where students have suffered a physical injury during athletic events, in science laboratories, on field trips, at the school bus stop, or on the playground, parents more often than not allege that negligent acts of a principal, coach, or teacher on duty were the proximate cause of injury suffered by their child.

Currently, however, the boundaries of professional liability are expanding beyond the confines of the traditional tort claim. Civic leaders and community members, especially parents, are demanding positive academic results from public school students, and questions are being asked about the effectiveness of instruction. Thus, a different type of educational malpractice/tort claim—a failure-to-learn claim—might be possible. Who is at fault when an individual school falls below specified statewide academic standards and loses its accreditation? Who is at fault when a student is denied a high school diploma because he or she failed a state mandated end-of-course examination?

Educational accountability, as measured by student academic achievement, focuses attention on the professional expertise and potential liability of every principal and classroom teacher. Contemporary public school administrators and teachers are becoming increasingly aware of their potential liabilities for student learning. They realize that in addition to their responsibility for the physical safety and well-being of students, the public holds them responsible for each student's educational development. As in situations where a student has suffered a physical injury, administrators and teachers must be able to show that they were not negligent in the performance of their professional responsibilities. In other words, they must demonstrate that neither their acts nor their failures to act were the proximate cause of harm to a student (the harm being, in this case, a student's apparent inability to meet academic standards).

The legal analysis in a failure-to-learn malpractice claim is the same as that used in a traditional physical injury tort claim. The plaintiff will need to show that the following elements are present: (1) The principal or teacher owed the student a duty (in this type of claim, either instruction or supervision); (2) the principal or teacher breached the duty owed, either through an act of commission or omission; and (3) the principal's or teacher's breach of duty was the proximate cause of the injury or loss suffered by the student.

Legal Considerations

The absence of specific language in the U.S. Constitution regarding education and schools, coupled with the language of the Tenth Amendment and the theory of parens patriae (state as parent over all citizens), places the direct legal authority and responsibility for public education in the hands of each state (*Pierce v. Society of Sisters,* 1925).

The U.S. Supreme Court has held that education "is not among the rights afforded explicit protection under our Federal Constitution" (*San Antonio I.S.D. v. Rodriguez,* 1973). Thus, one must look to the constitutional and statutory mandates of each state to establish whether or not education is considered a fundamental right of school-age children, to construct the educational commitment made to each school-age child, and to gauge whether or not that commitment is being met.

The Fourteenth Amendment to the U.S. Constitution reads, in relevant part, "[No] State [shall] deprive any person of life, liberty, or property, without due process of law. . . ." The U.S. Supreme Court has held that public education (i.e., the benefits of educational opportunities), where provided by the state, is a property interest of all school-age children in that state. As such, public school students must be accorded basic procedural due process before being deprived of that interest (*Goss v. Lopez,* 1975).

The Fourteenth Amendment also grants equal protection of the law to all citizens. Applied to matters of public education, the

U.S. Supreme Court has held that no child of school age shall be victimized by governmental discrimination and denied equal access to the benefits of educational opportunities (*Brown v. Board of Education,* 1954).

Federal Law

Educational malpractice actions based on federal statutory law are unlikely. With the possible exception of a claim based on the prescribed criteria for meeting specific educational progress indicators that are spelled out in a student's IEP under the Individuals with Disabilities Educational Act (IDEA), it would be difficult to build a malpractice case. In January 2002, as a part of the reauthorization of the Elementary and Secondary Education Act (ESEA), President George W. Bush signed the No Child Left Behind initiative into law. For the first time in history, the federal government will tie eligibility for federal funding to student testing results. By 2002–2006, ESEA requires annual testing of all public school students in grades 3–8.

State Law

Educational malpractice claims based on violations of state law might be more likely. To date, 15 states have legislatively established student competencies on a statewide basis in grades 3–8, and in such areas as English, mathematics, and history at the secondary school level. These states have constructed standardized examinations to measure those competencies for all public school students. For example, in Maryland, students are tested on a statewide basis in six subjects in grades 3, 5, and 8 as part of the Maryland School Performance Assessment Program. In Pennsylvania, the Pennsylvania System of School Assessment enables comparisons of student achievement in local school systems on a statewide basis.

Technology now makes it possible to link student academic progress to individual schools and, ultimately, to individual classroom teachers. Often, these results are published for public consumption in school system and individual school "report cards." Also reported to the community are school accreditation results. If students do not perform at established academic

levels or, despite getting good grades in courses, they fail to pass state mandated end-of-course examinations and, consequently, a school loses its state accreditation, will claims of educational negligence, educational nonfeasance (failure to perform a required duty), or educational misfeasance (a required duty was not performed in a professionally competent way) be possible?

Case Law Examples

Scheelhaase v. Woodbury (1973/1974). Where a classroom teacher was fired because her students scored low on standardized achievement tests, the court upheld the dismissal. In the court's view, because the improvement of test scores was a primary objective of the school board, and the teacher had failed to meet the board's professional expectations, the dismissal was justified.

Peter W. v. San Francisco U.S.D. (1976). A high school graduate who could not demonstrate an ability to read and write unsuccessfully sued a public school system claiming that he received inadequate instruction and negligent teaching. The suit also alleged that school officials had engaged in false representation by promoting him from grade to grade, giving his mother the impression that he was performing at or near grade level, and, finally, by granting him a diploma.

The court disagreed with the plaintiff. As the court saw it, classroom methodology affords no readily acceptable standards of care, cause, or injury; the science of pedagogy is fraught with differing and conflicting theories; and a student's achievement of literacy is influenced by a host of factors from outside the formal teaching process.

Donahue v. Copiaque Union Free School Dist. (1979). A high school graduate unsuccessfully sued a school system because of his inability to comprehend written English. At 18 years of age, he could not complete employment applications, could not read a restaurant menu, and had to orally take his driver's test. He, and his parents, claimed, among other things, that the school system failed to perform its duty to properly educate him, failed to provide personnel trained to help him, and failed throughout his education to advise his parents of their child's difficulties.

The court held that there is no cognizable claim of educational malpractice in tort law. To entertain such a cause of action would place the court in a position of judging the day-to-day operations of schools. Moreover, because there are so many collateral factors involved in the learning process, proximate causation of the student's failure to learn would be difficult, if not impossible, to prove. Student motivation and temperament, past experience, and home environment all play a role in the learning process.

Hunter v. Board of Education (1981). The court rejected an educational malpractice claim where the plaintiff alleged that a student had been improperly placed, taught, and evaluated. Courts may not decide the curriculum, nor the degree of proficiency needed to advance from grade to grade. Courts are not the proper forums for the resolution of such controversies.

Debra P. v. Turlington (1984). Although not specifically an educational malpractice claim, this case is relevant to the idea of educational malpractice nonetheless. The case involved a state statute that required students to pass a statewide competency test as a precondition of receiving a high school diploma. Plaintiffs, who were unsuccessful in making their case, alleged that the requirement would have a disproportionate effect on black students.

In remanding the decision, the 11th Circuit directed that two questions be answered. First, can it be shown that the test is a fair assessment of what is actually taught in the curriculum of the public schools of the state? In other words, is the test instructionally valid? Second, is there a causal connection between the failure rates of some students (here, black students) and the past effects (socioeconomic as well as educational) of racial segregation in public schools?

Tollett v. Orleans Parish School Board (2001). The court ruled that school board members could not be held liable for the fact that uncertified instructors taught junior high school students Algebra I, even though the students would be ineligible to receive high school credit because of this situation.

Policy Considerations

It is important that local school board policy be applied to matters of alleged educational malpractice. Consider the following questions when dealing with such matters:

- Does the school board have a policy clearly stating its goals and objectives concerning student academic achievement, as well as its academic expectations for all students in the school system?
- How are these academic goals, objectives, and expectations spelled out and are they linked to statewide academic mandates?
- What does the policy say about alignment of the school curriculum (including classroom methodologies, instructional materials, and teacher-made tests) with statewide academic requirements?
- What does the policy say about remediation of student academic deficiencies (including how, when, and by whom)?
- What does the policy say about the role of the school principal and his or her responsibilities as an instructional leader?
- What does the policy say about the principal's accountability for student academic progress and school accreditation?
- What does the policy say about the responsibilities and accountability of classroom teachers and other professional staff for student academic progress?
- What does the policy say about students being taught by instructors who are trained, certified, and endorsed in the subjects that they teach?
- How will professional productivity be measured?
- How does the policy on student academic achievement relate to other school system policies regarding assessment and evaluation of principals, teachers, and other staff members, as well as causes for dismissal from employment?
- What does the policy say about parent and community involvement in matters of student academic achievement?

Practical Considerations

With today's emphasis in public education on measuring and monitoring student academic progress and achievement, Anita knows that she and her staff will be held accountable if the school does not meet the expectations for quality held by parents and the community at large. Nonetheless, she should not overreact to the threat of an educational malpractice suit made by representatives of PAE.

Anita should immediately respond in a non-defensive manner and make positive comments using clear language (as opposed to educational jargon). She must assure PAE parents, before they exit her office, that she has confidence in the professional competence of her staff. Further, she must iterate her belief that the students at Academic Village are receiving an effective and meaningful education designed to move them toward successful mastery of state and local requirements. Anita should extend an invitation to members of PAE to visit the school (announced or unannounced), observe their children's classrooms, and examine all curriculum materials currently in use at any time that is convenient to their busy schedules.

At the next regularly scheduled faculty meeting, Anita should inform her staff members of the concerns recently expressed by PAE, assure them of her complete confidence in their efforts to implement all local and state curricular and testing requirements, offer an invitation to help them in any way they deem appropriate, and remind them of the school's "open door" policy regarding parental visits and classroom observations. If any future parental concerns arise that staff members consider more administrative in nature, Anita should insist that teachers refer the parent(s) directly to her.

Finally, Anita will want to continue to monitor all student test results and keep abreast of what is being taught in each of the school's classrooms. In essence, as the instructional leader of her school, Anita must work with her staff to be certain that all local and state curricular requirements are integrated into what is being taught in each classroom. She must also ensure that every student who needs remediation and/or special assistance

is identified early on so that the proper steps can be taken to address that student's needs.

Postscript

With state standards-based assessment serving as a barrier to student graduation (and/or promotion) and school accreditation, an increased emphasis is being placed on the competence of teachers and administrators. Data-driven management is being used to analyze the results of student performance in order to alter teaching strategies, motivational techniques, and professional development. The primary purpose of high-stakes reform is additional accountability; the goal, therefore, is not only the improvement of student performance, but also a more accurate assessment of the factors influencing instruction. The greatest impediment to the morale of an outstanding teacher is the potential that incompetence will be protected or ignored. Schools and districts can no longer afford to ignore substandard performance in this area.

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Index

accountability, educational, 189–197
Adler v. Duval County, 74
administrators, school. *See* school administrators
Advancement Project, 35
alcohol testing. *See* drug and alcohol testing, random
Americans with Disabilities Act (ADA), 146, 171
Arizona
  homeschooled students, 138
  Internet access, 124
  student dress, 109
Arizona codes, regulations, and policies, 109, 124, 138
Arkansas, Internet access, 124
Arkansas codes, regulations, and policies, 124
A.S. v. State of Florida, 5
asthma, 147–148
athletics, drug testing and, 25–26
Aubrey v. School Board of LaFayette Parish et al., 31

Bach v. School Board of the City of Virginia Beach, 102
Banks v. Sellers, 182
Bartlett v. Moore Business Forms, Inc., 58–59
Beilan v. Board of Education, 172
Belanger v. Nashua, 157
Bethel School District v. Fraser, 89, 106, 114, 123, 130
birthday parties, 93–94
Bishop v. Colaw, 107
Blair v. Union Free School District, 157
Board of Education of Independent School Dist. No. 92 of Pottawatomie City v. Earls, 26–28, 32
Board of Education v. Mergens, 52, 89, 130–131
Board of Education v. Pico, 99, 130
Board of Education v. Van Kast, 173–174
Board of Regents v. Roth, 170, 172–173
Board of Trustees of Bastrop Independent School District v. Toungate, 109–110
boards of education. *See* school boards
Boroff v. Van Wert City Board of Education, 107
Boucher v. School Board, 115
Boy Scouts of America v. Till, 132
Bridgman v. New Trier High School Dist. No. 203, 5
Brown v. Gilmore, 74
Brown v. Gwinnett School District, 74
Burnham v. West, 5

calendars, school, 86–87, 93–94
California
commercialism, in schools, 43
  community access to school facilities, 52
  crisis management and planning, 13
  School Community Policing Partnership Program, 19
  student dress, 109
California codes, regulations, and policies, 13, 19, 43, 109
Chamberlin v. Dade County Board of Education, 68, 88
Chandler v. Miller, 30–31

Chandler v. Siegelman, 74
Children's Internet Protection Act (CIPA), 123
Ciniceros v. San Diego Unified, 132
Civil Rights Act of 1964, 81, 171
Cleveland Board of Education v. LaFleur, 173
Cleveland Board of Education v. Loudermill, 170, 173
Clever v. Cherry Hill Board of Education, 91
clubs, student. *See* organizations and clubs, student
C.N. v. Ridgewood Board of Education, 158
Coffee County School Dist. v. Snipes, 183
Coles v. Cleveland Board of Education, 70
Colin ex rel. Colin v. Orange Unified School Dist., 132
Collins v. Chandler, 73
Collins v. Faith School District, 174
Collinsville Community Unit School Dist. No. 10 v. White, 101
Colorado, homeschooled students, 138–139
Colorado codes, regulations, and policies, 138-139
Columbine school shootings, 11
Commercial Alert, 44
commercialism, in schools, 40–46
Commonwealth v. Carey, 5
Community Operated Policing Services (COPS), 18–19
community use, of school facilities, 47–55
compulsory attendance laws, 12
computers, Internet access via, 121–126
confidentiality, of student records, 151–161
Connecticut, medicine in schools in, 146–147
Connecticut codes, regulations, and policies, 146-147
consent, student, for searches, 7
continuing contract status, 167
Cotton v. Paschal, 183
crisis management and planning, 10–16
curriculum, religion in, 78–86

Daniel S. v. Board of Education, 158
Davis v. Francis Howell School District, 146
Davis v. Mass. Interscholastic Athletic Association, 140
DeBoard v. Board of Education of Ferguson-Florissant School District, 146
Debra P. v. Turlington, 194
Depperman v. Regents, 157
DesRoches v. Caprio, 5
devotional exercises, 68–69. *See also* religion/religious issues
D.G. and C.G. v. Independent School District Number 11 of Tulsa Co., Oklahoma, 38
DiBari v. Bedford Central School District, 83
districts, local school. *See* school boards
Doe v. Porter, 83
Donahue v. Copiaque Union Free School Dist., 193–194
dress, student, 104–111
drug and alcohol testing, random, 23–33
drug-related disciplinary infractions, zero tolerance of, 33–39
due process, 191

educational malpractice, 189–197
Edwards v. Aguillar, 83
Einhorn v. Maus, 157
Eisner v. Stamford School Board, 114
Elementary and Secondary Education Act, 12–13, 71, 192
employees, school. *See also* teachers and staff
  drug and alcohol testing of, 30–33
  evaluation of, 165–178
Engel v. Vitale, 68, 72, 80, 88
Environmental Protection Agency (EPA), 57–58, 59
Epperson v. State, 82
Equal Access Act (20 U.S.C. 4071), 48, 49, 51, 89, 129
Equal Pay Act of 1972, 171
Establishment clause, of First Amendment, 50–51, 67–68, 91, 129–130
evaluation, of school personnel, 165–178
executive sessions (of school boards), 99–100
extracurricular activities, and drug testing, 26–27

facilities, school. *See* school facilities
faculty. *See* teachers and staff
Family Educational Rights and Privacy Act (FERPA), 153, 155–156, 158
Fay v. South Colonie Central, 157

Ferrell v. Dallas Independent School District, 107
filtering software, 122–123
Florey v. Sioux Falls School District, 90
Florida
  commercialism, in schools, 43
  crisis management and planning, 13
Florida codes, regulations, and policies, 13, 43
Florida v. D.S., 6
funding, of schools, 41–42

Gambino v. Fairfax County School Board, 114
Georgia, medicine administration, 147
Georgia codes, regulations, and policies, 72, 147
Gernetzke v. Kenosha Unified School District, 131
Gilliand v. Board of Education, 174
Gish v. Board of Education, 173
Glover v. Williamsburg Board of Education, 174
Gonzaga University v. Doe, 158
Good News Club v. Milford, 131
Goss v. Lopez, 191
graduation ceremony prayer, 68–69, 73–74. *See also* religion/religious issues
Grayned v. The City of Rockford, 101
Griswold v. Connecticut, 154
Gruenke v. Seip, 157
guidance office, records, 151–161
Gun-Free Schools Act (GFSA), 35, 36, 37, 38

Harper v. Edgewood Board of Education, 106
Harvard Civil Rights Project, 35
hate speech, 113
Hazelwood v. Kuhlmeier, 89, 114, 115, 123, 130
Healy v. James, 130
Hemry by Hemry v. School Board, 115
holidays, 86–94
homeschooling issues, 135–143
Hooks v. Clark County School District, 138
Hortonville Joint School District v. Hortonville Education Association, 98
Hsu v. Roslyn Union Free School District No. 3, 52–53
Hunter v. Board of Education, 194
Hunt v. Board of Education, 73

Idaho, homeschooled students, 139
Idaho codes, regulations, and policies, 139
Illinois, crisis management and planning, 13
Illinois codes, regulations, and policies, 13
immunity, governmental, 179–186
Individuals with Disabilities in Education Act (IDEA), 138, 146, 153, 192
Indoor Air Quality (I.Q.), 59–60
insurance, 182
Internet use, 121–126
In the Interest of Angelia D.B., 6

Jackson v. Dorrier, 107
Jacobs v. Benedict, 157
Jeglin v. San Jacinto Unified School District, 106
Jones v. Clear Creek I.S.D., 73–74
Jovner, v. Whiting, 114
Joye v. Hunterdon Central Regional High School Board of Education, 29–30

Kaptein v. Conrad School District, 140
Karcher v. May, 73
Karen B. v. Treen, 73
Knapp v. Vestal Cent. School Board, 59
Knox County Education Association v. Knox County Board of Education, 31, 33

Lamb's Chapel v. Center Moriches Union Free School District, 53
Lansing Association of School Administrators v. Lansing Board of Education, 174
law enforcement, school relationships with, 17–23
law enforcement officers (school-assigned)
  COPS funding, 18–19
  roles delineated, 22
  and student records, 160–161
  and student searches, 6–7
Lee v. Weisman, 65, 68, 73
Lemire v. Silva, 174
Lemon v. Kurtzman, 68, 72–73, 90, 129–130
Lentz v. Morris, 182
liability issues. *See* immunity, governmental
libel, 154–155
Linhart v. Lawson, 183
Littlefield et al. v. Forney Independent School District et al., 108

Lynch v. Donnelly, 129–130

Maine, homeschooled students, 139–140
Maine codes, regulations, and policies, 139-140
Mainstream Loudon v. Board of Trustees of Loudon County Library, 124
malpractice, educational, 189–197
Mapp v. Ohio, 154
Marchi v. B.O.C.E.S. of Albany, 83
Marsh v. Chambers, 70
Massie v. Henry, 107
McCollum v. Board of Education, 72
medicine, in schools, 144–150
Merriken v. Cressman, 157
Meyer v. Nebraska, 80, 170, 172
Miller v. Houston, 174–175
Molitor v. Kaneland, 182
moments of silence, 69–70, 73–74. *See also* religion/religious issues
Montgomery v. City of Detroit, 183
Morris v. School District, 182
Mozert v. Hawkins County Public Schools, 82, 90
Mt. Healthy v. Doyle, 170, 173
Murray v. Apfel, 59

National Treasury Employees Union v. VonRaab, 30
Nebraska, medicine administration, 147
Nebraska codes, regulations, and policies, 147
New Jersey, and suspiciousless drug testing, 29–30
New Jersey v. T.L.O., 4–6, 25
New Mexico, commercialism in schools, 43
New Mexico codes, regulations, and policies, 43
newspapers, school, 89. *See also* publications, student
New York
  commercialism, in schools, 42–43
  school and law enforcement cooperation, 20
New York codes, regulations, and policies, 42-43
Nicholson v. Board of Education, 115
Nichols v. Harford County Board of Education, 175
No Child Left Behind Act (2001), 71, 192
nonprofit community groups, and school use, 48–49
nurses, school, 146–147

Nye v. Roberts, 175

Occupational Safety and Health Administration (OSHA), 59
Odenheim v. Carlstadt-East Rutherford Regional School District, 29
Olesen v. Board of Education of School District No. 228, 108
Omnibus Transportation Employee Testing Act (49 U.S.C. § 2717), 31
Oregon, homeschooled students, 140
Oregon codes, regulations, and policies, 140
organizations and clubs, student, 48, 53, 127–134
Ornelas v. United States, 6
Owasso I.S.D. v. Falvo, 158

Palmer v. Board of Education, 82
parens patriae, 191
parents
  and educational records, 155–156
  and school commercialization, 44, 45
Pat Doe v. John Yunits, et al., 109
Peloza v. Capistrano, 83
Perry Education Association v. Perry Local Educators, 101, 130
Perry v. Sindermann, 170
personnel evaluation. *See under* teachers and staff
Peters v. Bowman Public School Dist. No. 1, 101
Peter W. v. San Francisco U.S.D., 193
Phoenix Elementary School District No. 1 v. Green, 110
Pierce v. Society of Sisters, 80, 191
Police Dept. of the City of Chicago v. Mosley, 101
political campaigning, and school policies, 49
Pope v. East Brunswick Board of Education, 52, 131
prayer in schools, 65–78
probable cause, 4–5, 6
publications, student, 112–117. *See also* newspapers, school

Ratner v. Loudon Co. Public Schools, 37
reasonable suspicion, 4–6
Rehabilitation Act (Section 504), 146
religion/religious issues
  holidays, 86–94
  prayer in schools, 65–78
  religion as curriculum, 78–86
  school facility use and, 51

Religious Expression in Public Schools: A Statement of Principles (U.S. DOE), 71
Richards v. Thurston, 107
Rivera v. Community School District, 174
Rosenberger v. Rector and Board of Visitors, 131

Safe and Drug Free Schools, 12–13
Sain v. Cedar Rapids, 158
Salt Lake City Board of Education, 52
San Antonio I.S.D. v. Rodriguez, 191
Santa Fe I.S.D. v. Doe, 69, 89
Scheelhaase v. Woodbury, 173
school administrators
  crisis management and planning, 10–16
  evaluation of, 168
  and law enforcement relationships, 17–23
  and student search policies, 6–10
school boards
  commercialism in schools, 40–46
  crisis management and planning, 13–14
  drug testing policies, 31–32
  governmental immunity, 179–186
  meeting agendas and process, 95–104
  prayer at, 70
  student dress, 104–111
  student search policies, 8
  zero tolerance policies, 33–39
School Dist. of Abington Township v. Schempp, 68, 80, 82, 88
school districts, 97–99. *See also* school boards
school facilities
  community use of, 47–55, 132
  health issues, 55–61
school resource officers (SROs). *See* law enforcement officers (school-assigned)
Seal v. Morgan et al., 37–38
searches, of students, 4–10
Seattle School Board, and Channel One agreement, 44
Sechler v. State College Area School District, 91
Shade v. City of Farmington, 6
Shedrick v. William Penn School Dist., 183
Sheelhause v. Woodbury, 193
Shirley v. Beauregard Parish School Board, 101
sick building syndrome (SBS), 56–61
Skinner v. Railway Labor Executives' Assn., 30
slander, 154–155
Smith v. Smith, 82
Snyder v. Charlotte Public School District, 141
speech, protection of, 38
staff, school. *See* teachers and staff
standards-based assessment, and educational accountability, 197
State of Florida v. N.G.B., 6
State of New Hampshire v. Drake, 5
State of New Hampshire v. Heirtzler, 7
Stein v. Oshinsky, 72
Stone v. Graham, 82
students
  dress policies, 104–111
  drug and alcohol testing of, 23–33
  graduation ceremony prayer, 68–69, 73–74
  hair length, 107, 109–110
  homeschooling, 135–143
  Internet use, 121–126
  medicine possession and use, 144–150
  organizations and clubs, 48, 53, 127–134
  searches of, 4–10
  student publications, 112–117
  student records, 151–161
Superintendent of Schools, evaluation of, 168
Supreme Court. *See* U.S. Supreme Court
Swanson v. Guthrie Independent School District No. I-1, 137
Sweezy v. New Hampshire, 81
Sypniewski v. Warren Hills Regional Board of Education, 108

Tannahill v. Lockney Independent School District, 28–29
Tarasoff v. Regents, 157
teachers and staff
  drug and alcohol testing of, 30–33
  educational accountability, 189–197
  evaluation of, 165–178
  health issues and school facilities, 55–61
  as student club sponsors, 131
Tennessee, zero tolerance policies, 37
Tennessee codes, regulations, and policies, 37
tenure, 167
Texas, medicine administration, 147
Texas codes, regulations, and policies, 147

Thomas v. Alleghany Co. Board of Education, 140
Tinker, Fraser, and Chandler v. McMinnville School Dist., 111
Tinker v. Des Moines Independent School District, 67, 88, 106, 113, 114, 123, 129, 130
Tollett v. Orleans Parish School Board, 183, 194
tort claims acts, 181–182
Trachtman v. Anker, 115
transcripts. *See* student records under students

United States codes, regulations, and policies
  20 U.S.C. § 8921, 36
  20 U.S.C.S. § 7114 (2002), 12
  20 U.S.C.S. § 7138 (2002), 13
  49 U.S.C. § 2717, 31
  Americans with Disabilities Act (ADA), 146, 171
  Children's Internet Protection Act (CIPA) (47 U.S.C. § 254), 123
  Civil Rights Act of 1964, 81, 171
  Elementary and Secondary Education Act, 12–13, 71, 192
  Equal Access Act, 48, 49, 51, 89, 129
  Equal Pay Act of 1972, 171
  Family Educational Rights and Privacy Act (FERPA), 153, 155–156, 158
  Gun-Free Schools Act (GFSA), 35, 36, 37, 38
  Individuals with Disabilities in Education Act (IDEA), 138, 146, 153, 192
  No Child Left Behind Act (2001), 71, 192
  Omnibus Transportation Employee Testing Act, 31
  Rehabilitation Act (Section 504), 146
  Safe and Drug Free Schools, 12–13
United States v. Miami University, 157
United Teachers of New Orleans v. Orleans Parish School Board, 31
U.S. Constitutional Amendments
  First Amendment, 38, 49–51, 67–68, 88, 105–106, 113–114, 123, 129
  Fourteenth Amendment, 25, 37–38, 80, 170
  Fourth Amendment, 4–6, 24–25, 30, 32
  Tenth Amendment, 80, 98
U.S. Department of Education, 71
U.S. Department of Justice, Community Operated Policing Services (COPS), 18–19
U.S. Supreme Court
  on drug testing, 25–28
  on education not afforded Constitutional protection, 191
  on freedom of expression, 88–89, 113–114
  on personnel evaluation, 170–171
  on religion and schools, 67–69, 70, 72–73, 82
  on right of privacy, 154

Van Allen v. McCleary, 157
Vernonia School Dist. 47J v. Acton, 25–26, 27
Vines v. Board of Education of Zion School District No. 6, 107–108
Virginia
  community access to school facilities, 52
  crisis management and planning, 13
  hazing, 129
  homeschooled students, 140
  Internet access, 124
  medicine administration, 147–148
  prayer in schools, 72
  student dress, 109
  zero tolerance policies, 37
Virginia codes, regulations, and policies, 13, 37, 72, 109, 124, 140, 147-148

Wallace v. Jaffree, 69, 70
Washington, D.C. snipers case, 19
Washington, zero tolerance policies, 37
Washington codes, regulations, and policies, 37
weapon-related disciplinary infractions, zero tolerance of, 33–39
weather crises, 10–16
West Virginia State Board v. Barnette, 80
Widmar v. Vincent, 101, 130
Williams v. Spencer, 115
Willis v. Anderson, 28
Wisconsin
  commercialism, in schools, 43
  student dress, 108–109
Wisconsin codes, regulations, and policies, 43, 108-109
Wisconsin v. Yoder, 80

zero tolerance policies, 33–39

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